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WASHINGTON REPORTS

VOL. 58

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

MARCH 25, 1910—JUNE 10, 1910

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 8231. Department Two. March 25, 1910.]

SARAH J. MOORE *et al.*, *Respondents*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—CROSSINGS—DEFECTS — DEATH — CAUSE — EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that the death of a drayman, who fell from his wagon and was killed while driving across a railroad track, was due to a defective crossing, because too narrow and the rails too high and liable to cause the wagon to slew to one side when crossing at an angle, where it appears that the crossing was fourteen feet wide, that there was no occasion for the drayman to drive across at an angle, and that he had attempted to cross the track a few feet east of the crossing prepared by the railroad company; there being no liability where one negligently turns aside from a crossing prepared and uses another way.

Appeal from an order of the superior court for Lincoln county, Neal, J., entered April 29, 1909, granting a new trial, after dismissing the jury and directing judgment in favor of the defendant, in an action for wrongful death. Reversed.

F. V. Brown and *J. J. Lavin*, for appellant.

W. E. Southard and *Southard & Southard*, for respondents.

MOUNT, J.—Respondents brought this action to recover damages on account of alleged negligence of the appellant,

[1]Reported in 107 Pac. 852.

which negligence it is alleged caused the death of Michael Schabb, the father of Jennie Schabb and, at the time, the husband of respondent Sarah J. Moore. The cause was tried to the court with a jury, and resulted in the discharge of the jury and a directed judgment for the defendant. Thereafter the respondents filed a motion for new trial upon several grounds. The motion was based upon the record of the case and affidavits of newly discovered evidence. This motion was not heard by the judge who tried the case, but was heard by his successor upon the record which is now before us. The court made an order granting a new trial without specifying the ground therefor. This appeal is from the order granting the new trial.

The case is presented here solely as one of law, to the effect that, under all the facts which were received and offered in evidence at the trial and those discovered after the trial, no case is made out sufficient to go to the jury. No other question is presented. The facts are as follows: The appellant in the year 1905 maintained a station or depot in the town of Wilson Creek. A railway track, called a house track, extended east and west on the north side of this depot. The town is north of this house track. On the east side of the depot and to the south of the house track, there was an L-shaped platform, the short end of the L or platform being at right angles to the house track and near to it. The long side of the platform extended east and west parallel with the house track and about thirty-three to thirty-six feet distant therefrom. This platform was about three feet high. The space between the house track and the platform was covered with soft cinders. At the northeast corner of the depot, where the west end of the platform was nearest the house track, a crossing had been constructed and maintained by the railroad company for the use of teams in going to and from the platform. This crossing was made by laying boards lengthwise of the rails on the railroad ties, on both sides and between the rails. These boards were about six-

teen feet long. They were not thick enough by two or three inches to come to the level of the tops of the rails. Some steps extended from the platform to the ground at the northeast corner of the depot near this crossing, so that the length of the crossing was reduced about two feet, leaving about fourteen feet space for the crossing.

On the evening of December 26, 1905, the deceased, Michael Schabb, who was a drayman, hauled some trunks from the residence part of town to the depot. He drove over the crossing, made a turn of his wagon in the angle of the platform, and backed his wagon up against the long part of the platform. He unloaded the trunks and attempted to drive away. It was quite dark, but he was seen to drive away. After he had gone but a few feet the wheels of the dray were heard to strike the rails of the house track, and were seen to "slew to one side," and Mr. Schabb "was hurled suddenly out of the dray, apparently over the front end thereof." The team of horses moved up a few feet and stopped. The witness who saw this paused for a moment, and, concluding that Mr. Schabb was not hurt, passed into the depot. A few minutes later Mr. Schabb was found dead under the left front wheel of his wagon. His neck was broken. He had attempted to cross over the railroad tracks a few feet east of the crossing prepared by the railway company.

It is alleged, that the appellant was negligent for the reason that the crossing was defective, in that the rails extended above the planking so that it made the crossing dangerous; that the crossing was located too close to the depot and did not extend a sufficient distance to the east. It is argued by the respondents that the space between the platform and the house track was too narrow, and the soft cinders thereon made it difficult for teams to turn around therein. The appellant argues that the facts are insufficient to go to the jury, because (1) it is not shown that the decedent came to his death by reason of being jolted from his wagon, and

the cause of death is mere conjecture; (2) because it is not shown that the condition of the crossing caused the decedent to attempt to cross at the place where he did, and (3) because the deceased attempted to cross the rails at a place other than the one prepared for such purpose.

These last two positions must be sustained. The fact that the space between the house track and the platform was narrow and soft, so that it was difficult for teams to turn around therein, is of no importance in this case, because it was shown by the respondents' evidence that the deceased did turn his team around and back his wagon so that the rear thereof was against the platform where he unloaded his trunks. It is plain, therefore, that the deceased could readily have driven out over the crossing the same way he drove in. It is true there is some evidence to the effect that wagons frequently "slewed" when an attempt was made to cross the rails at an angle, and this is no doubt a fact. But there is no evidence in the record to show that a wagon once turned around could not be driven out over the regular crossing without crossing the rails at an angle, and there is no evidence that it was necessary for the deceased to attempt to cross the rails at the place where he did, viz., three or four feet to the east of the crossing which the company maintained. The crossing was at the corner of the platform nearest the depot building. It was sixteen feet in length, but some steps leading from the platform occupied two feet of this length, leaving the driveway fourteen feet in width. This was clearly sufficient for the purpose for which it was used or intended.

If the deceased had used this crossing and, by reason of its defective or dangerous condition, had been injured, complaint then might be made that the company was negligent; but when it is shown and conceded that he attempted to cross in another place, not used or intended as a crossing, the company may not be held for an injury occurring there, because the negligence of the company was not the cause of

the injury. The reason why the deceased attempted to drive his wagon across the rails of the track rather than over the crossing is not shown. It was clearly more dangerous to attempt to cross the rails where no crossing was prepared, than it was to attempt to cross where a crossing was constructed for that purpose. No excuse is attempted, excepting the fact that it was difficult to turn a wagon, such as deceased used, in the narrow space and soft cinders between the house track and the platform. But this excuse failed when it was shown that he did turn his wagon, which was backed up against the platform, before he started away. Where a railroad company has prepared a crossing over its rails, this is an invitation to the public to make use of such crossing, and the company would be liable to a person injured in using such crossing while exercising ordinary care, if the crossing proved to be unsafe for any cause of which the company was bound to take notice. If a person voluntarily or negligently turns aside from such crossing, and uses another way which is not held out as a crossing and which is obviously more dangerous, there is no liability on the part of the company. 33 Cyc. 929; Thompson, Negligence, § 6269; *Carey v. Inhabitants of Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Kelley v. Town of Fond Du Lac*, 31 Wis. 179; *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464. This is a reasonable rule, and the facts in this case are controlled by it. It is not claimed that the deceased could not see the crossing, or that the company was negligent in any other respects than those above mentioned.

Under all the facts in the case, there is no liability against the appellant, and the order granting the new trial is therefore reversed, and the cause ordered dismissed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8409. Department Two. March 25, 1910.]

ALEX HANSON, *Respondent*, v. SPOKANE VALLEY LAND AND WATER COMPANY, *Appellant*.[1]

NEGLIGENCE—WAYS—INVITATION—LICENSEE—PLEADING. An allegation that a road was a private road and way of necessity, constantly traveled over by the public generally, has the effect to charge that it was a public way over private land, and use thereof by the public for some years amounts to an implied invitation to the public to use it, so that one using it would not be a mere licensee.

SAME—WAYS—PERSONS LIABLE—EXCAVATIONS. A water company making an excavation across a public way on private land, is liable for consequent injuries to a traveler impliedly invited to use the road, although the company was not the owner of the land.

SAME—WAYS—INVITATION. A well-defined private way connecting with the main traveled road, left open to and much traveled by the public, amounts to an implied invitation to the public to use it.

SAME—WAYS—NEGLIGENCE. It is negligence to dig a ditch across a public road on private land, and leave the same unguarded at night.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 5, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by reason of defendant's ditch across a highway. Affirmed.

Allen & Allen, for appellant.

A. G. Gray, John M. Gleeson, and *Joseph F. Morton*, for respondent.

MOUNT, J.—The respondent in this case was injured by falling into a canal across a way which he was traveling after night. He recovered a judgment against the appellant, which constructed the canal. Appeal is prosecuted from that judgment.

The complaint upon which the case was tried alleged, among other things, that on the 1st day of January, 1908

[1]Reported in 107 Pac. 863.

and for some years prior thereto and ever since said time, there was and is a well defined and traveled private road and way of necessity which the public generally, constantly, and daily traveled over and upon, and the same was and has been for many years last past open to travel as aforesaid, and is a well-defined road running in a northerly and southerly direction through about the middle of the east half of section 4, township 25 north, range 45 E., W. M., said road being about a mile long and connecting with the public highway on the north line of section 4; that during the early part of the year 1908, the defendant company commenced to construct a large irrigation ditch in an easterly and westerly direction across said section 4 and across said road at right angles; that in constructing said ditch the defendant company excavated on the east and west up to the line of said road, and then ceased to excavate for some period of time unknown to the plaintiff; that said road remained in said condition unobstructed by any excavation for some period of time unknown to the plaintiff, and during said time said road was traveled by the plaintiff and the public generally; that subsequently, about the 8th day of June, 1908, the defendant company carelessly and negligently extended said ditch six to eight feet wide and one and one-half to two feet deep, across said road, and carelessly and negligently allowed said ditch to remain without any barrier, lights, or warning to the public and the persons traveling over said road, and on or about the 18th day of June, 1908, at about nine o'clock in the nighttime, the plaintiff was traveling over said road on horseback when the horse fell into said ditch and caused plaintiff to be thrown upon the horn of the saddle, permanently injuring the plaintiff.

It is argued by the appellant that the court erred in overruling his demurrer to this complaint, and also in overruling his objection to the introduction of any evidence under it. This argument is based upon the fact that the complaint alleges that the way was a "private road and way of neces-

sity," and it is not alleged that the way belonged to the plaintiff, and that the only interest which the plaintiff had therein was as one of the public, and that there is no allegation that the owner of the way invited the public to use it. It is argued from these facts that the plaintiff and the public using the road were mere licensees, and that the owner of the land owed no duty to a traveler thereon except to avoid wilful wrong and wanton carelessness. While the complaint alleges that the road was a private road and way of necessity, it also alleges in that same connection that the road was traveled over by the public generally, constantly, and daily for some years prior to January 1, 1908. The effect of these allegations is that the road was a public way over private land. The whole allegation taken together could mean nothing less. It is not claimed that the plaintiff was the owner of the way, but he certainly had the same right as any of the public to use it. While the complaint does not directly allege an invitation to the public, it appears that the public made use of the way for "some years prior to January 1, 1908," and that the way connected with the public highway on the north of section 4. This amounts to an implied invitation, because public user long continued will imply an invitation. *Phillips v. Library Co.*, 55 N. J. L. 307, 27 Atl. 478. Or it may be implied when an owner by acts or conduct leads another to believe that the land was intended to be used as he used it, and that such use is not only acquiesced in by the owners, but is in accordance with the intention or design for which the way was adapted or allowed to be used. *Turess v. New York S. & W. R. Co.*, 61 N. J. L. 314, 40 Atl. 614.

It follows, therefore, that the respondent was not a mere licensee. He was an invitee under the alleged facts. Such invitation would continue so long as the way remained open and the public availed itself of such use, and while continued, the owners and others would be liable the same as though such road were regularly laid out and owned by the

public. It is the rule, as argued by the appellant, that an owner owes to a licensee no duty as to the condition of the premises, except that the owner should not knowingly permit the licensee to run upon hidden dangers, or wilfully cause him harm. *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526. But to one invited upon premises, the owner is under obligation for reasonable security for the purpose for which the invitee is upon the land. *Beehler v. Daniels, Cornell & Co.*, 18 R. I. 563, 29 Atl. 6, 49 Am. St. 790, 27 L. R. A. 512. Mr. Thompson, in his Commentaries on the Law of Negligence, at § 1012, vol. 1, states the rule as follows:

"If a man establishes a private road, path or other way upon his own ground, and impliedly invites the public to use it, he is, according to some holdings, under an obligation to exercise reasonable care and diligence to keep it in a safe condition for the benefit of any one who may have to use it,—that is to say, to keep it free from dangerous obstructions, pitfalls, etc."

After referring to certain American and English cases, the same author, at § 1015, continues:

"Some of the foregoing decisions are difficult to reconcile with the general rule of law already stated, that bare licensees take the premises of the land-owner as they find them, and come upon them at their own risk, and that he is under no duty to exert himself to keep them safe for his benefit. If the land-owner has been in the habit of allowing the public to make use of a private way while it was safe, and has, by some affirmative act of his own, endangered the passage upon it without giving the public any warning,—as by digging an unguarded pit by the side of it,—it would seem that he ought to be held liable in damages for any injury thereby happening to any member of the public, on the ground that he has been guilty of a plain violation of social duty. But where a man establishes a private way of any sort for his own purposes merely, the mere fact that he is not so unneighborly as to exclude the public from the use of it, ought not, it should seem, to place him under any particular duty to care for it, to the end of promoting *their* safety."

Mr. Wharton states the rule as follows:

"Nor am I justified in making excavations either on the path which I have permitted other persons to traverse, or so near a public road that travelers, in the ordinary aberration or casualties of travel, may stray or be driven over the line and be injured by falling into the excavation. But beyond this my liability to trespassers, voluntary or involuntary, does not go. I may make what excavations I choose on my own land, without fencing them in, provided they are not on a line over which I permit travelers to pass, or so near a public road that in them a traveler may unwittingly fall." Wharton, Law of Negligence (2d ed.), § 349.

And in 29 Cyc., page 466, as follows:

"Where the public has been accustomed to use a private way it is negligence for the owner to make an unguarded excavation therein, or otherwise dangerously obstruct it, or to conduct his business in a manner dangerous to those passing, or to fail to keep it in repair."

See, also, *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188, 61 Pac. 689; *Campbell v. Boyd*, 88 N. C. 129, 43 Am. Rep. 740; *Phillips v. Library Co.*, *supra*; *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727.

It is immaterial whether the appellant owned the land over which the way was used. Under the rule above stated, he would be liable if he made a dangerous excavation in the way, where he knew the public were invited and were accustomed to travel. We are of the opinion, therefore, that the complaint states a cause of action.

It is also argued that the court erred in denying appellant's motion challenging the sufficiency of the evidence to sustain a verdict. This argument is based upon the theory that the evidence fails to show a private way of necessity, or that the public had a legal right to use the road, or that the appellant owed any duty except to avoid wilful and wanton injury. The evidence very clearly shows, that the road in question was a well-defined and much traveled road; that it connected with the main traveled public highway to

the north; that for many years it had been closed by a gate at the public highway, and that people using the road had opened and closed this gate; that about two years before the accident, the gate had become dilapidated and was not thereafter used, and the road was kept open to the public. This clearly implied an invitation to the public, and any person having occasion there to use the same, and whether the road was originally intended as a private way or way of necessity is of no importance. The fact that the road was well defined and much used and was left open, was an invitation to the public as much as though a special notice had been posted authorizing its use. Under these conditions and under the authorities above cited, it was the duty of the appellant, or any other person making an excavation therein or digging a canal across the road, to take some precaution to warn persons lawfully there of danger. An excavation such as the one in question here, across a road where persons had a right to be after night, was in the nature of a trap.

It is also argued that the evidence shows that the respondent knew, or should have known, of the ditch, and should have avoided it in the exercise of ordinary care, and therefore may not recover. The evidence was conflicting upon these points, and the finding of the jury is conclusive.

Several objections are made to the instructions. The main points urged against the instructions are disposed of by what we have said above, and we shall not further discuss them. It is sufficient to say, however, that the instructions given by the court were clear and concise and covered the law of the case fully. No error was made either in the instructions given or in those requested and refused.

The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8459. Department Two. March 25, 1910.]

C. H. DEIGHTON, *Respondent*, v. ARIE HOVER, *Appellant*.[1]

TELEGRAPHS AND TELEPHONES—WRONGFUL OPENING OF TELEGRAM—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that defendant opened a telegram making plaintiff a cash offer for land, where it appears that it was delivered to defendant upon his offering to deliver it to the plaintiff, that he did not deliver it, but on the next day defendant closed a trade with the plaintiff for the land, which trade he had just previously refused to make, and after the trade attempted to dispose of the land to the party who had made the offer in the telegram.

SAME—MEASURE OF DAMAGES. Under Rem. & Bal. Code, § 2977, giving treble damages for all loss and damages sustained by the wrongful opening of a telegram, where defendant, by wrongfully opening a telegram making plaintiff a cash offer for land, induced plaintiff to trade the land to the defendant for less than was offered, the measure of damages is the difference between the value of the land given and the value of that received, irrespective of the tentative offer, where it was probable plaintiff could have sold for its full value.

NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION. It is not an abuse of discretion to refuse a new trial, asked because of a conversation held by respondent's counsel with a juryman, in a public place, in the presence of appellant's counsel, no reference to the case being made in the conversation.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered April 30, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Ernest L. Kolb and *Happy, Winfree & Hindman*, for appellant.

Henry J. Snively, Humphrey & Cole, and *Linn & Boyle*, for respondent.

MOUNT, J.—Plaintiff brought this action to recover treble damages, alleging in his complaint that the defendant had opened a telegram addressed to plaintiff, had learned the

[1]Reported in 107 Pac. 853.

contents of the message, and by reason thereof had made a trade with the plaintiff without informing the plaintiff of the telegram. The case was tried to the court and a jury, and verdict was returned in favor of the plaintiff for the sum of $1,400, but upon motion for a new trial, the court required a remission of $400 from the verdict. On this remission being made, a judgment was entered in favor of the plaintiff for $3,000. The defendant has appealed.

It appears that prior to February, 1908, the respondent owned one hundred and twenty acres of timber land in the state of Oregon. The appellant was engaged in the real estate business, and owned some land near Kennewick in this state. The respondent had been in the employ of the appellant. He had offered to exchange his land in Oregon to the appellant for certain land then owned by the appellant, but this offer was refused. The respondent thereupon requested his father-in-law, one L. M. Willcuts, residing in Duluth, Minnesota, to find a purchaser for the Oregon timber land. Mr. Willcuts entered into negotiations with the Weyerhauser Timber Company, which maintained an office at Cloquet, Minnesota, which negotiations resulted in an offer of $2,000 by that company for the land; whereupon Mr. Willcuts sent a message to the respondent by the Western Union Telegraph Company, as follows:

"Duluth, Minnesota, February 19, 1908.
"C. H. Deighton, Kennewick, Washington.
"Weyerhauser offers two thousand for the land. What shall I do? L. M. WILLCUTS."

This telegram was received at Kennewick on the day of its date. It was sealed in an envelope and delivered to the appellant, who said he was going out to where the respondent lived and would deliver the message to him. The appellant neglected to deliver the telegram to the respondent, and on the next day after its receipt, without informing the respondent about the message, entered into negotiations with him which resulted in the exchange of the respondent's timber

land to the appellant for lands near Kennewick which the jury found to be of the value of about $1,600. The evidence tended to show that the respondent's timber land at that time was worth $3,000. After the exchange had been made and deeds passed, the respondent learned that the telegram had been sent and delivered to the appellant, who explained that he had forgotten the receipt of the message. Thereafter the respondent desired to rescind the contract, and offered to reconvey the land received from the appellant, but the latter refused a rescission. After the appellant had acquired respondent's land he sought to communicate with the Weyerhauser company at Duluth, but that company had no office at that place.

It is argued by appellant that the court should have directed a verdict for the appellant. While there was no direct evidence that the appellant opened the telegram or knew the contents of it, the circumstances are fairly conclusive that he did so. He had a short time prior refused to consider an offer of exchange for the timber land. The next day after the telegram was delivered to him he proposed an exchange. He did not deliver the telegram until after the exchange was completed. Thereafter he sought to communicate with the Weyerhauser company at Duluth where that company had no office. The telegram was sent from Duluth, and there was nothing on the outside of the envelope indicating where it was sent from. These are circumstances which the jury had a right to consider, and which with other facts in the case are, we think, sufficient to sustain a finding that appellant had opened the telegram and learned its contents.

It is also argued that the court erred in its instruction to the jury to the effect that the measure of damages was the difference between the value of the land given and the value of the land received, at the date of the exchange. Appellant contends that the court should have instructed that the measure of damage was the difference between the amount of the offer of the Weyerhauser company, viz., $2,000, and the

value of the land received by the respondent. The respondent, however, had not offered the land at that price. He was not bound to accept the offer which was made to him. He might have refused that offer. The proof tended strongly to show that the land was worth $3,000 at that time, and that it would have been purchased by the Weyerhauser company at the latter figure. This was, therefore, the value of the land. While the statute under which the action was brought is a penal statute and should be strictly construed, as appellant argues, it provides that the party injured shall recover treble damages "for all loss and damages sustained by reason of such wrongful act." Rem. & Bal. Code, § 2977. The loss sustained is plainly the difference between the value of the land given and that of the land received, irrespective of the tentative offer made. The parties were not dealing at arm's length. If the appellant knew the contents of the telegram, which we must assume to be the fact, he was in possession of information which of right belonged to the respondent, and which respondent had a right to know before the trade was made. The appellant wrongfully withheld this information and deceived the respondent, and thereby consummated a trade which could not otherwise have been made. He appreciated that fact and wrongfully used it to his advantage. If the information contained in the telegram had been given to respondent before the trade was consummated, then the parties would have concluded the contract at arm's length. But this was not done, and appellant cannot now be heard to say that he and respondent dealt at arm's length. He was clearly guilty of fraud and deceit.

It is also argued that the court erred in not granting a new trial, because one of the respondent's counsel during the trial held a conversation with one of the jurors. This conversation appears to have occurred in the presence, if not within hearing, of appellant's counsel, in a public place, and no reference was made to this case in such conversation. While such practice is not to be commended, we think the

trial court did not abuse its discretion, and therefore did not err in denying the motion on this ground.

We find no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 8541. Department Two. March 25, 1910.]

UNITED STATES FIDELITY & GUARANTY COMPANY, *Respondent*, v. CORDIE C. LEE, *Appellant*.[1]

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—PROFITS—COMMUNITY PROPERTY. Under our community property laws authorizing every married woman to hold and dispose of her separate estate as if she were unmarried, the profit made by a married woman upon selling a contract for the purchase of land, prior to payment of the last two installments, is her separate estate and not community property, where she entered into the contract to purchase in her own name, her husband not joining, making the first payment out of separate estate, and giving her personal notes for five subsequent annual installments, and she then had separate moneys sufficient to make all the payments, and made two subsequent payments out of her separate estate; it appearing that she was dealing with her separate estate and that there was no intent to involve the community property.

Appeal by intervener from a judgment of the superior court for Adams county, Kennan, J., entered December 8, 1909, upon findings in favor of the plaintiff, in garnishment proceedings, after a trial on the merits before the court without a jury. Reversed.

Merritt, Oswald & Merritt, for appellant.

Danson & Williams, for respondent.

MOUNT, J.—Cordie C. Lee, the appellant here, intervened in a garnishment proceeding, and claimed as her separate property certain money on deposit in the Old National Bank

[1]Reported in 107 Pac. 870.

of Spokane, which money had been garnisheed upon a debt owing by her husband, O. M. Lee, to respondent. Upon trial the court found that a part of the money garnisheed was the separate property of the appellant, and that the balance was community property belonging to the appellant and her husband. The appeal is from the order adjudging the community interest.

There are no disputed facts in the case. Stated in chronological order the facts are, in substance, as follows: On April 4, 1902, O. M. Lee, then an unmarried man, became a surety to the respondent United States Fidelity and Guaranty Company upon an indemnity bond. On May 24, 1902, Mr. Lee was married to the appellant. At the time of the marriage, appellant was possessed of about $6,500, which she had inherited from her mother's estate. On November 9, 1905, appellant purchased a section of land from John Bovee for an agreed price of $3,200. She paid $640 in cash from her separate funds, and agreed to pay the balance in annual payments of $512 each, with interest at six per cent on deferred payments, and when the purchase price was fully paid a deed was to be delivered to her. She signed a written contract to that effect, and executed her personal notes for the deferred payments. At the time of this transaction, she had separate property in the hands of her brother in Kentucky sufficient to make the whole payment, and she intended to and did use this money to meet the payments when due. On December 1, 1906, she made the second payment of $512, and $153.60, interest, out of her separate property. In June, 1907, a judgment in the sum of $3,250 was obtained by the respondent against O. M. Lee, ner husband, by reason of the indemnity bond above mentioned. On December 1, 1907, appellant paid out of her separate funds $512, and $122.88, interest, being the installment due on her contract at that time.

On March 4, 1908, appellant sold to R. L. Ford the land

above referred to, for $6,400, and she and her husband joined in the contract of sale and deed. Appellant objected to her husband joining in the transaction, but upon the request of the purchaser and the advice of her attorneys that this would prevent any question of the community interest of her husband, the joinder was made. On March 30, 1908, a supplemental contract was made by which Mr. Ford agreed to pay to Mr. Bovee direct the balance due from appellant upon the purchase price of the land. This contract and deed were placed in escrow in the Old National Bank of Spokane. On December 1, 1908, Mr. Ford paid to Mr. Bovee $512 principal and $92.16 interest, being the fourth installment due Mr. Bovee on the contract with appellant. On December 28, 1908, a writ of garnishment was served on the Old National Bank, in the action wherein the respondent had a judgment against O. M. Lee. Thereafter the appellant intervened in the garnishment proceedings, and claimed the whole of the property in the hands of the bank as her separate estate. Pending the trial, Mr. Ford paid the balance of the purchase price of the land into the bank. The court concluded that $1,664, and certain interest, paid by the appellant out of her separate funds, entitled her to 1664-3200 interest in the funds as her separate estate, and that the balance paid by Mr. Ford into the bank was community property subject to the payment of the judgment against Mr. Lee. The question in the case is whether, under the facts stated, the proceeds of the sale of this land are wholly the separate property of the appellant.

The appellant acquired the property after marriage. She acquired it with her separate funds; that is, she made the contract in her own name without her husband joining her, and made three payments thereon out of her separate funds. It is true that she gave her individual notes for deferred payments, but at that time she had separate funds sufficient to make the whole payment. She did not desire to pay cash, and credit was extended for her accommodation.

The record does not show directly that the vendor who took the contract and the notes relied upon her separate estate. The record is silent upon that question. No deed passed, and it was agreed that the deed should not be delivered until payments were fully made or until a mortgage was given back. The vendor probably relied upon the land as security for the deferred payments, and therefore made no inquiry as to the responsibility of the appellant in her separate right. The appellant, however, had money available sufficient to make the payments, and intended to do so out of her separate funds without assistance from her husband, but before the time when all the payments became due she sold the land for double the purchase price, and thereby made a profit of $3,200 upon an investment of $1,939.40. The statutes of this state provide:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him." Rem. & Bal. Code, § 5916.

Property not owned or acquired as above stated, but acquired after marriage, is community property. Rem. & Bal. Code, § 5917.

"Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried." Rem. & Bal. Code, § 5925.

"Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried." Rem. & Bal. Code, § 5927.

It seems clear from these provisions that a married woman may deal with her separate property as if she were unmarried, and that money or other property owned by her at

the time of her marriage together with the "rents, issues and profits" of such money or property shall not be subject to the debts or contracts of her husband, and that she may manage, lease, sell, convey, and incumber such property in the same manner as her husband can property belonging to him. It is clear, therefore, that if the appellant had paid her separate cash for the section of land which she acquired by contract from Mr. Bovee, the profits arising from the sale thereof would have been her separate property. She did not pay cash. She entered into a contract in her own name, without her husband joining her, to purchase the land. She made the first payment of $640 out of her separate estate. She agreed to pay the balance in five annual installments, and gave her personal notes for the deferred payments. She had the money or property in her separate estate which would be available and sufficient to meet these obligations when they matured. She afterwards paid the second and third installments out of her separate funds, but before the maturity of the fourth installment she sold the land, or more accurately speaking, the contract, thereby making a profit on the investment.

The evidence is reasonably certain that the transaction was the personal contract of the appellant dealing with her separate estate; that no community funds were invested, and there was clearly no intent to involve the community of herself and husband therein. If the personal notes signed by the appellant had not been given, it could not be said that there was any liability against either the appellant personally or against the community, for the contract was one by which the vendee agreed to convey the land to appellant when the payments were fully made. Time was made the essence of the contract, and it was provided that a failure to make any payment when due forfeited all payments made as liquidated damages. If a married woman may manage, sell, and incumber her separate property, and have the same right to acquire, manage and dispose of said property, and

to sue and be sued, as if she were unmarried, and if contracts may be made by the wife, and liabilities incurred and the same enforced by or against her, to the same extent and manner as if she were unmarried, as the statutes quoted above provide, it is difficult to understand why the appellant was not acting within and for her separate rights when she made the contract stated.

The presumption is that property acquired during the marital relation is community property, but this presumption may be rebutted. *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109; *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. 395. This presumption has been met and clearly overcome in this case. The case of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, was thought by the trial court to control this case. That case and the authorities therein cited are relied upon by the respondent for an affirmance of the judgment rendered in this case. In that case we said:

"From the foregoing statement it will be seen that the property acquired from the railway company and the mortgage company was paid for in part by the separate funds of the wife and in part by money borrowed on the property in which she had invested her separate funds. Under the rule announced by this court in *Yesler v. Hochstettler*, 3 Wash. 349, 30 Pac. 398, and reaffirmed on rehearing in *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125, the funds borrowed by the wife, even though borrowed on her separate property, or on property in which she had invested her separate funds, was community property, and to that extent at least the property in controversy was paid for with community funds and became community property."

We do not desire to further extend the rule announced in that case. In that case, and in the cases from this court there followed, the separate estates were not sufficient to make the purchases, and the credit of the community was drawn upon to complete the purchases. Money was actually borrowed and used for that purpose, so that a community obligation was created and a resulting community interest fol-

lowed. The property thus purchased was not acquired by separate property, or the rents, issues, and profits thereof. In the case at bar the appellant borrowed no money. Her separate estate was amply sufficient to meet the whole contract at the time it was entered into. She was not required to create a community obligation, and did not intend to do so. She entered into a contract which her separate estate was sufficient to protect, and which she partly performed with separate funds, and without doubt intended to carry out as her separate contract without community liability. In these respects this case is distinguishable from *Heintz v. Brown, supra.* If we apply the rule in that case to the facts in this case, we must hold that married persons may not purchase property as separate property, except for cash, and may not make contracts and incur liability to the same extent as though unmarried, which is squarely in the face of the statutes above quoted. Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof. Tested by this rule, we are satisfied that the property in question here was wholly the separate property of the appellant. We are therefore of the opinion that the contract in this case created no community obligation which would necessarily take the case within the rule of the *Heintz* case.

The judgment appealed from is therefore reversed, and the cause remanded with directions to the lower court to declare the whole fund in the bank the separate property of the appellant.

RUDKIN, C. J., DUNBAR, and PARKER, JJ., concur.

CROW, J., took no part.

[No. 8574. Department Two. March 25, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. OSCAR KROOK, *Appellant*.[1]

INTOXICATING LIQUORS—SALES—STATUTES—IMPLIED REPEAL. The pharmacy act, Rem. & Bal. Code, § 8459, relating to the drug business and authorizing the sale of spirituous liquors by druggists for medical purposes, does not impliedly repeal Rem. & Bal. Code, § 6275, relating to the sale and disposal of intoxicating liquors and requiring sales by druggists for medical purposes to be upon the written prescription of a reputable physician; since repeals by implication are not favored, and this rule has special application where the laws relate to different subjects.

INTOXICATING LIQUORS — SALES—LICENSES—DRUGGISTS—PRESCRIPTIONS. Rem. & Bal. Code, § 8459, amending the pharmacy law so as to provide that "no other license shall be necessary under any ordinance of any city" to make sales of intoxicating liquors under the pharmacy act, merely means that the state law shall govern, and was not intended to authorize sales without a state license and physician's prescription.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered October 30, 1909, upon a trial and conviction of selling intoxicating liquors without a license. Affirmed.

John R. Crites, for appellant.

George Livesey and *J. W. Kindall*, for respondent.

MOUNT, J.—The appellant was convicted of the crime of selling liquor without a license. A fine was imposed, and this appeal followed.

The facts are stipulated in substance as follows: On August 15, 1909, the appellant was a clerk in a pharmacy or drugstore conducted by a corporation in the city of Bellingham. This pharmacy was in charge of a regularly registered pharmacist. On that date the appellant sold to one W. H. Dole one half-pint of whiskey. The sale was made in the belief that the purchaser would use the liquor for medicinal

[1]Reported in 107 Pac. 1032.

purposes, but it was not made in a case of extreme illness where delay was dangerous to the patient. The sale was not made upon the prescription of a physician, and the drug company possessed no license issued by the city for the sale of intoxicating liquors. At the time of the sale, an entry was made upon a record kept for that purpose, showing the quantity purchased, the date and purpose for which purchased, and also the buyer's name and address.

The facts in the case are substantially the same as in *Seattle v. Foster*, 47 Wash. 172, 91 Pac. 642. That case was prosecuted under a city ordinance, while this is prosecuted by the state. The appellant in the *Foster* case contended that Bal. Code, § 2937 (Rem. & Bal. Code, § 6275), was repealed by implication by the pharmacy act of 1899, and that, since the passage of the latter act, druggists and pharmacists were authorized to sell intoxicating liquors for medicinal purposes, without a prescription from a physician and without a license, by merely making and keeping the required record of such sales. We refused to follow that reasoning, and said:

"The well-established rule that repeals by implication are not favored in law has a peculiar application here, for the two acts under consideration relate to widely different subjects—the former to the sale and disposal of intoxicating liquors, the latter to the conduct of the drug business. We are firmly convinced that the legislature did not intend to permit a drugstore to become a grogshop by merely keeping a formal record of its sales, and such would be the ultimate effect of upholding the contention of the appellant."

During the session of the legislature of 1909, after the decision in the *Foster* case, § 15 of the pharmacy act of 1899 (Laws 1899, p. 222), was amended so as to read:

"Provided, that no such wines, spirituous or malt liquors shall be sold for any other than medicinal, scientific, mechanical or sacramental purposes, and no other license shall be necessary under any ordinance of any municipality for pharmacists to make said sale in compliance with the provi-

sions of this act." Laws 1909, p. 731, § 8 (Rem. & Bal. Code, § 8459).

This provision in the Law of 1899 read as follows:

"Provided, that no such wines, spirituous or malt liquors shall be sold for any other than medical, scientific, mechanical or sacramental purposes, and no other license shall be necessary under any law of the state for pharmacists to make said sale in compliance with the provisions of this act." Laws 1899, p. 222, § 15.

It will be noticed that the only change in the provision was that the words "any law of the state" were made to read "any ordinance of any municipality." Other changes, however, were made in the section, but such changes are not material here. It is now contended by the appellant in this case, as it was in the *Foster* case, that the pharmacy act of 1899, as amended in 1909, repealed by implication Rem. & Bal. Code, § 6275, regulating the sale of intoxicating liquors; and it is also contended that the amendment of 1909, as above set out, was for the purpose of permitting pharmacists to sell intoxicating liquors without a prescription therefor.

We cannot sustain either of these contentions. The first is disposed of in *Seattle v. Foster, supra.* We are satisfied with the rule there stated, and do not desire to change it in this case. We are also satisfied that the amendment of 1909 does not have the effect contended for by the appellant. The phrase "no other license shall be necessary under any ordinance of any municipality," simply means that the state law shall govern. We held in the *Foster* case, *supra,* that the state law, as declared by Rem. & Bal. Code, § 6275, was in force and controlled such cases. The amendment therefore was in conformity with the opinion in that case, rather than in avoidance of it. Furthermore, if the legislature had intended by the amendment to provide that druggists and pharmacists might sell intoxicating liquors without a license and without a physician's prescription therefor, it would without doubt have done so directly by amending or repealing

Rem. & Bal. Code, § 6275, which we held controlled in such cases. It did not do so, and we are satisfied did not intend to do so by the amendment of 1909 above considered.

The judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 8579. Department Two. March 25, 1910.]

W. P. McELWAIN, *Appellant*, v. DAN ABRAHAM *et al.*, *Respondents*.[1]

COUNTIES—COMMISSIONERS—POWERS—JUSTICES OF THE PEACE—APPOINTMENT OF ASSISTANT CLERKS. Justices of the peace not being county officers, under our constitution, their offices pertaining to judicial business, the county commissioners, under their general authority and control over county business and officers, are not authorized to employ bailiffs or assistant clerks for justices of the peace, the legislature having expressly authorized the employment of one clerk for each justice of cities of the first and second classes.

Appeal from a judgment of the superior court for King county, Main, J., entered November 22, 1909, upon sustaining a demurrer to the complaint, dismissing an action to enjoin county officers from issuing warrants in payment of claims for salaries. Reversed.

Wm. Hickman Moore, for appellant.

George F. Vanderveer and *M. H. Ingersoll*, for respondents.

MOUNT, J.—This action was brought by the appellant, as a citizen and taxpayer, to enjoin the county commissioners and the auditor of King county from allowing, auditing, and drawing warrants in payment of claims for salaries of certain persons appointed by the county commissioners as bailiffs and assistant clerks for certain justices of the peace

[1]Reported in 107 Pac. 832.

in King county. The trial court sustained a general demurrer to the complaint, and dismissed the action.

The appeal presents but one question, viz., whether under the law county commissioners are authorized to employ and pay for bailiffs and assistant clerks for justices of the peace in cities of the first class. It is apparently conceded by counsel for the respondents that there is no statute directly authorizing such appointment. But it is argued that the commissioners under their general powers, having the care of county property and the management of the county funds and business, have such authority. *Martin v. Whitman County*, 1 Wash. 533, 20 Pac. 599; *State ex rel. Whitney v. Friars*, 10 Wash. 348, 39 Pac. 104, and *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974, are relied upon to sustain these appointments. The first of these cases was one where the county employed an agent for a strictly county purpose in the management of the affairs of the county. The next one announced substantially the same rule as was announced in the first case. The other case held that § 2 of the act of 1890, p. 304, referring to certain county officers, expressly authorized such officers to appoint, with the consent of the county commissioners, necessary help in their offices. None of these cases control the question presented here, for justices of the peace are not designated as county officers and are not such officers in law. The constitution, at § 10 of article 4, provides:

"The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties, and jurisdiction of justices of the peace: . . . In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use."

Justice courts are not courts of record. Const., art. 4, § 11. The legislature has provided for four justices of the peace in certain cities of the first class. Laws 1909, p. 567 (Rem. & Bal. Code, § 6537). Provision has also been made for con-

stables, who are precinct officers and peace officers in such courts. Rem. & Bal. Code, §§ 6524, 6529. Provision has also been made for clerks as follows:

"The board of county commissioners shall allow each justice in cities of the first class, and may allow each justice in cities of the second class, one clerk, at such salary as they may designate; said clerk to be paid in the same manner and at the same time as the said justices." Rem. & Bal. Code, § 6547.

This statute clearly limits the number of clerks for each justice in such cities to *one* clerk. It does not mean more than one clerk, and it does not mean one clerk and such number of assistants as the county commissioners may deem necessary. There is no provision for the appointment of bailiffs for such courts. It seems clear that, where the legislature has provided for one constable and one clerk for such courts, and made no provision for other officers thereof, no other officers may be legally appointed as a charge upon the county. The county commissioners are the general agents of the county and have the care of county property and the management of county funds and business, but they derive their powers from the legislature and may exercise only such powers as are expressly conferred or are necessary to the performance of their duties. While justices of the peace, constables, and clerks are paid out of the county funds, and the fees collected are paid into the county funds, the business of their offices is not strictly county business. It is well defined and pertains to judicial business, over which the county commissioners have no control except to see that the fees are properly accounted for and the salaries paid. If the business of these officers is more than they can care for, the remedy must be sought from the legislature and not from the boards of county commissioners.

It would not, we think, be contended that, under their general authority, county commissioners may appoint assistant justices of the peace to each of the four justices provided by law, or that they may appoint assistant constables

because in the opinion of the county commissioners such assistants might become necessary, for the number of such justices is expressly limited and there is no provision for assistants. But if the commissioners have authority to appoint bailiffs and assistant clerks as they have done in this case, they have, for the same reason, authority to appoint assistant justices and constables where the legislature has expressly limited the number of such officers. We are clearly of the opinion that these officers were appointed without authority of law and in violation thereof, and that such appointments create no liability against the county.

The judgment of dismissal is therefore reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8346. Department One. March 26, 1910.]

WILLIAM F. SHEARD, *Appellant*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Respondent*.[1]

INDEMNITY — BREACH OF BUILDING CONTRACT — LIMITATIONS—ACCRUAL OF ACTION. Under a contractor's indemnity bond, in which the obligee assumes to indemnify the owner against any pecuniary loss resulting from the breach of any of the terms of the building contract, the actual substantial breach does not occur, where liens are filed for labor and material, until the liens become an established charge against the property.

SAME—CONTRACT AS TO LIMITATIONS—REASONABLENESS. A limitation in a contractor's indemnity bond executed July 22, to the effect that no suit shall be maintained thereon after February 22 following, is unreasonable and therefore not binding on the parties, where the bond indemnified the plaintiff from any pecuniary loss by reason of the contractor's agreement to build a house costing about $15,000, within 120 days, the contractors became insolvent in January following, when a receiver was appointed, who completed the house in June following, and liens for labor and material filed

[1]Reported in 107 Pac. 1024; 109 Pac. 276.

after the time stipulated for bringing suit were not finally established until two years later; since ascertainment of the amount of the loss was not possible until long after the limitation had expired.

INDEMNITY—CONTRACTOR'S BOND—LIABILITY — UNPAID ATTORNEY'S FEES. A contractor's bond indemnifying against loss by reason of the breach of the building contract being one of indemnity, recovery cannot be had for $1,000 attorney's fees allowed in lien foreclosures, where only $250 of the same had been paid by plaintiff before commencing his action on the bond.

SAME—DAMAGES—LIQUIDATED DAMAGES. Where a building contract provided stipulated damages of $10 per day for each day's delay in completing the building, and authorized a deduction thereof from the contract price, the owner is not obliged to apply any part of such damages to the satisfaction of obligations incurred by the contractor for which an indemnity bond was given.

SAME. A surety company indemnifying against loss on a building contract, having had the option to assume and complete the building and failed to exercise it, cannot complain of demurrage stipulated as damages for delay in completing the work.

SAME—DAMAGES—EXTRA WORK. In an action upon a contractor's bond indemnifying against loss by reason of a breach of a building contract, there can be no recovery for extra work not embraced in the contract.

SAME—DEFENSES—FORMER ACTION —FINDINGS — CONCLUSIVENESS. An owner who is a party to lien foreclosure suits is precluded, in his subsequent action upon the contractor's bond, from asserting that findings in the lien suit were not within the issues and not binding upon him, in the absence of the record in that case.

SAME—DAMAGES—COSTS OF FORMER SUIT. In an action upon a contractor's bond indemnifying against loss by reason of a breach of the building contract, the plaintiff cannot recover the costs of defending lien foreclosures which were not taxed or legally taxable, nor for costs in resisting a claim established against him for extra work not covered in the contract.

COSTS—ON APPEAL. Upon reversal of case with directions for judgment and allowance of certain expenses as costs, the amount of which does not appear in the record on appeal, the costs allowable are to be submitted to and determined by the lower court.

Appeal from an order of the superior court for Pierce county, Shackleford, J., entered August 14, 1909, granting defendant a new trial, after judgment entered upon the ver-

dict of a jury rendered in favor of the plaintiff, in an action upon a contractor's indemnity bond. Reversed.

F. S. Blattner and *L. B. da Ponte*, for appellant.

Frederick H. Murray, for respondent.

Gose, J.—On the 22d day of July, 1905, the appellant, the plaintiff below, entered into a contract with Depew & Overfield, whereby the latter agreed to erect for the former a residence and certain outbuildings, furnish all labor and material, and complete the contract within one hundred and twenty days, according to plans and specifications referred to and made a part of the contract. The consideration agreed upon was $14,980, payable in installments as the work progressed. Contemporaneously with the execution of the building contract, the contractors, and the respondent as their surety, executed and delivered a bond in the sum of $15,000, conditioned "that if the said principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions of said contract on the part of the said principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law." The bond also contained the provision "that in no event shall the surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action, or other proceeding thereto that is instituted later than the 22d day of February, 1906." The contractors became insolvent in January, 1906, and a receiver was appointed for them, who completed the buildings June 1 following. Numerous liens were filed against the property of the appellant, the first being filed March 28 and the last August 2, 1906. Actions were commenced in July, 1906, for the foreclosure of these liens, terminating in a judgment in this court on June 13, 1908 (*Jensen v. Sheard*, 49 Wash. 593, 96 Pac. 2), the remittitur being filed in the lower court July 14, 1908. This suit was commenced August 6, following. In the lien foreclosures cer-

tain liens were established against the appellant's property by the decree of the trial court, and the appeal was dismissed in this court.

This case was tried to a jury, which returned a verdict for the appellant for $3,234.35. The items making up the verdict were as follows: J. L. Todd, $573.65; St. Paul & Tacoma Lumber Co., $291.97; Savage-Scofield Company, $191.-73; Washington Hardware Company, $212.42; interest, $48,67; demurrage for 190 days at $10 per day, $1,900; attorney's fees in lien case, $1,000; court expenses in lien cases, $1,494.93; total, $5,714.35; from which they deducted the amount unpaid on the contract and in the hands of the appellant, $2,480, leaving a balance as stated in the general verdict. Thereupon, on motion of the respondent, a new trial was granted. This appeal is prosecuted from the order granting a new trial.

The first and principal contention of the respondent is that the action is barred by the limitation period fixed in the bond. We have quoted the provision of the bond, to the effect that the respondent shall not be subject to any suit that is instituted later than the 22d day of February, 1906, and have stated that this action was commenced in August, 1908. The contract provided that the buildings should be completed and delivered within one hundred and twenty days from July 22, 1905, and, as we have seen, the contractors became insolvent in January, 1906, and the contract was completed by their receiver June 1 following. The liens were filed after the time fixed in the bond for commencing suit.

The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute, and we think the better rule is that the limitation, if reasonable—and there is no reasonable excuse for delay in the commencement of the action—is binding upon the parties. One of the terms of the bond is that the obligors "shall well and truly indemnify and save harmless the said obligee from any pecuniary loss re-

sulting from the breach of any of the terms, covenants, and conditions" of the bond. There are three elements to this stipulation: (1) there must be a breach of the contract before there is a liability, (2) that the indemnitors will protect the indemnitee against all breaches, and (3) the protection guaranteed is against any pecuniary loss resulting from a breach of the contract. Stated in another form, there must have been a breach of the contract and a pecuniary loss suffered therefrom before the right of action accrued. To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together. The first breach of the contract occurred when the contractors failed to complete the building within the time agreed upon. This was a technical one, and there was no remedy upon the bond as no pecuniary loss had then occurred. The contractors not only undertook to complete the building within one hundred and twenty days, but also to furnish the necessary material and labor with which to complete it. We have seen that the liens were not filed until after the bar became complete under the bond, if that condition be literally enforced. The actual substantial breach did not occur until the liens became an established charge against the appellant's property. As was said in *Ovington v. Aetna Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021, the contract contemplates that the contractors shall furnish the labor and material, and the bond is not breached every time the contractor buys an article or employs a person to perform labor upon the building without paying for the particular article or service in advance, but the actual breach occurs when liens are filed and established by the judgment of a court of competent jurisdiction, on account of the failure of the contractor to perform his engagement. The same view is announced in *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052. The view that the limitation is not controlling unless it is reasonable, or where there is a

reasonable excuse for delaying the suit beyond the time agreed upon, is supported by the following authorities: Wood, Limitations, § 42; Stearns, Law of Suretyship, § 258; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Gulf C. & S. F. R. Co. v. Gatewood*, 79 Texas 89, 14 S. W. 913, 10 L. R. A. 419.

"But such condition will not be enforced where the delay is unavoidable." Stearns, Law of Suretyship, § 258.

And it will not be enforced where a reasonable excuse for the delay is shown. *Gulf C. & S. F. R. Co. v. Gatewood, supra.* What we deem the correct rule of construction, as applied to the facts in the case, is aptly stated in the *Longhurst* case, where the court, considering a similar limitation touching the insurance of a mechanics' lien, said:

"The defendant, in granting a policy upon a mechanic's lien, admits that it is an insurable interest. And so this court held in the case of *Carter v. The Humbolt Fire Insurance Company*, 12 Iowa 287. If, then, the company consents to grant a policy upon such an interest, they do so subject to the unavoidable delay in the judicial ascertainment of the value of that interest if a loss should occur. If, with reasonable diligence, the value cannot be legally ascertained in time to bring an action on the policy within a year from the date of the loss, then it follows (unless you wish to impute a dishonest purpose on the part of the company), that in granting such policy they intended to waive, in this class of insurable interest, the condition which limits the right of action on the policy to twelve months. By putting this construction upon the contract of insurance, you preserve the upright intent of the company intact. Whereas if you put the other construction upon it, you, by implication, charge, or perhaps it would be better to say, judicially determine, that the company granted a policy for a valuable consideration paid, which at the time, they had reason to believe, would be no risk to them and no protection to the insured, and thereby obtained money for themselves under false pretenses. True charity thinkest no evil. It is therefore right for us to presume, that it was the honest intent of the company, to insure the plaintiff's mechanic's lien upon the premises specified, against loss by fire, and upon the other hand, that it was

the expectation of the insured, in paying the required premium, that his policy would cover the loss and give him the requisite protection. It is the business of the court in construing the contract, to give effect, if possible, to the real intent and expectations of the parties. That can be done only in this case, by holding that the fifteenth condition of the policy under discussion, is not applicable to this particular class of insurable interest, and that when the defendant consented to take risks of this kind, it either intended to waive the limitation, or have it to commence running from the date that the value of the mechanic's lien should be judicially ascertained."

Lesher v. United States Fidelity & Guaranty Co., 239 Ill. 502, 88 N. E. 208, cited by the respondent, held a similar limitation a bar to an action commenced after the limitation period had expired; under a statute, however, which permitted the obligee, at any time after judgment, to sue out a writ of recovery to assess damages for a breach of any covenant contained in the bond subsequent to the former trial. Our attention has not been called to any such statute in this state, and we have not been able to find a similar one. *Hart v. Citizens' Ins. Co.*, 86 Wis. 77, 56 N. W. 332, 39 Am. St. 877, 21 L. R. A. 743, also cited by the respondent, held the limitation period contained in the contract controlling in a fire insurance policy. In such case the fire definitely fixed the liability. It would be unjust and unreasonable in this case to say that the contract should be so interpreted as to require the appellant to commence his action months before his pecuniary loss resulting from a breach of the contract was capable of ascertainment. He could not know the extent of his loss until after the building was completed. The policy of the law is opposed to the splitting of causes of action. The end sought to be accomplished by the bond was to secure the completion of the contract, within the time and in the manner fixed by the contract, or its legal equivalent, compensation in damages to the extent of the pecuniary loss. The bond does not oblige the obligors to pay legal liabilities, but to indemnify the appellant for any pecuniary loss he may sustain from

a breach of the contract; and in view of this provision, we agree with the appellant that it is an indemnity against liability for damages, and the cause of action did not accrue until the damages were judicially determined and actually paid.

"The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought, and a recovery had, until the liability is discharged." *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051.

See, also, *Fenton v. Fidelity & Casualty Co.*, 36 Ore. 283, 56 Pac. 1096, 48 L. R. A. 770; 16 Am. & Eng. Ency. Law (2d ed.), 178. The view we have expressed leads to the conclusion that the limitation in the bond is unreasonable, and that the delay in the commencement of the action was excusable.

Passing to a consideration of the item of $1,000, allowed by the jury as attorney's fees in the lien case, the record shows that only $250 of this amount has been paid. Having construed the bond as one of indemnity against damages, the recovery on this item is limited to $250, the sum paid before the commencement of the suit.

The contract provided that the appellant could deduct as liquidated damages the sum of $10 per day for each day of default in completing the contract. The court instructed the jury that this item could not be recovered for the time, if any, that the delay was caused by the appellant. Where the sum stipulated as damages is reasonable, and the determination of the actual damages difficult or impossible of ascertainment, the sum agreed upon will be treated as liquidated damages. *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51. The contract authorized a deduction of the stipulated damages, and the appellant was not required to apply any part of such sum to the satisfaction of obligations incurred by the contractor. The bond provided that in case of default the respondent could assume and complete the contract. It had notice of the default and failed to exer-

cise its option, and it is not in a position to complain of the demurrage.

In the lien case, the court found that certain claims for labor and material were for extra work not embraced in the contract, and the court instructed in this case that there could be no recovery for such items. The instruction was correct. The appellant contends, however, that the findings were not within the issues of the former case, and that it is not concluded by them. He was a party to the lien foreclosure suit, and in the absence of the record in that case, we must presume that the findings were within the issues and the evidence.

The jury allowed $1,495.93 for court expenses in the former suit. This includes certain items which were not taxed as costs. Appellant cannot recover any item as costs incurred in the former case that was not taxed or legally taxable as such. Nor can he recover for costs paid in resisting the claim established against him for extra work, but he can only recover such ratio of the costs as the sum found to be within the contract bears to the entire amount established in that suit. Other suggestions made by the respondent have been considered, but do not require separate discussion. There is no legal objection to the other items found in the special verdict. The view we have taken makes the respondent's liability a matter of mathematical computation under the verdict.

The judgment will be reversed, with directions to the lower court to enter a judgment for the appellant for all the items contained in the verdict, excepting the attorney's fees which will be allowed to the extent of $250. The court expenses will be allowed in conformity with this opinion. Neither party will recover costs of appeal.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

ON PETITION FOR REHEARING.

[Decided June 18, 1910.]

PER CURIAM.—In a petition for a rehearing, the appellant states that he has not been able to agree with the respondent

as to what costs are taxable, or the amount of costs to be allowed and deducted from the verdict under the opinion of this court, and asks this court to determine that question. We are unable upon the record to ascertain the amount of the taxable costs. This question should be submitted to and determined by the trial court in accordance with our former opinion.

[No. 8551. Department One. March 26, 1910.]

EDWARD VAN DE VANTER, *Respondent*, v. J. REDELSHEIMER *et al.*, *Appellants*.[1]

BAILMENT—USE—COMPENSATION—EVIDENCE—SUFFICIENCY. In an action to recover for the use of a young mare for about four years, the evidence is insufficient to support a verdict for $1,046.50 where the value of the animal or of her use was not shown, and the parties were brothers, neither engaged in a business indicating that other than ordinary use was contemplated; and $400 appears to be all that she could have earned.

PAYMENT—MEDIUM—CONTRACTS—BREACH. Under a promise "to do what is right," for the use of a mare, the medium of payment is money where no other is expressed, and a money compensation will be awarded for breach of the contract.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 10, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

McClure & McClure and *Hughes, McMicken, Dovell & Ramsey*, for appellants.

Frank S. Griffith, for respondent.

GOSE, J.—This is a suit to recover the reasonable rental value of a mare for four years, one month and four days, or an aggregate of fourteen hundred and ninety-five days.

[1]Reported in 107 Pac. 847.

There was a judgment for the plaintiff for $1,046.50. The defendants have appealed.

The case was tried to the court, and the recovery was had on the basis of seventy cents per day without abatement for Sundays or inclement weather. The trial of the case developed that the respondent delivered the mare to his brother, A. T. Van de Vanter, in his lifetime, on the promise of the latter "that he would do what was right." The promise was communicated to the respondent by a third party who was acting for A. T. Van de Vanter. The mare was delivered on May 20, 1904, kept by the deceased until his death in September, 1907, and thereafter retained by his estate until June 24, 1908. She was three years old at the time of the delivery, and only partially broken, according to the testimony of the respondent, and wholly unbroken if we accept the testimony of the executrix.

There is no evidence as to the value of the mare, other than the assumption of counsel upon the one side that she is worth $150 or $200, and the assumption of opposing counsel that she is worth $500. The respondent, however, states that she is a "registered standard-bred, thoroughbred mare," a breeding wholly unknown to the writer. The testimony as to the value of the use of a horse broken, fed, and cared for by the user where the use is continued for so long a period of time throws little light on the case. One of the respondent's witnesses, a liveryman, said that he rented horses for five months at the rate of sixty to seventy-five cents per day, but that the value depends a great deal upon the conditions and circumstances of the case; that sixty or seventy cents a day would not be reasonable unless "the horse earned it; worked right along," and that he did not know of a case like this. Another of the respondent's witnesses said that he would not take a horse at all under the conditions present in this case. A witness for the appellants stated that he would want something for his services for breaking and caring for a horse under similar conditions. No claim is made that the

mare was used for other than ordinary purposes, and the record leaves the character and extent of the use of the mare largely to conjecture.

It may be gathered, however, from all the testimony, that the circumstances are so unusual, so aside from the ordinary experience and observation, that any estimate of compensation must be based largely upon conjecture or mere arbitrary assumption. It would, however, be doing violence to reason and common sense to suppose that the respondent expected to receive, or that the deceased expected to pay, any such sum as the learned trial court allowed. If the deceased or his estate had converted the mare, or if she had been killed or lost through their negligence, the maximum recovery would be the value of the mare at the time and place of conversion or loss, with legal interest. The relation of the parties was such as to make it certain that the respondent did not intend to charge, and the brother did not intend to pay, livery rates. Neither party was engaged in the livery business. It would be absurd to presume that the deceased would have received, broken, and retained the mare had he supposed that livery rates would be exacted. However, the estate is liable for the reasonable value of the use of the mare for ordinary purposes. With such aid as we can gather from the testimony, our conclusion is that $400 is ample and adequate compensation. However distinguished the lineage of the animal may be, we do not think for ordinary use she could reasonably have earned a larger sum during the period involved in the suit.

The appellants urge that the promise of A. T. Van de Vanter "that he would do what was right" did not import an agreement to pay in money. We think the rule is that payment must be made in money unless a different medium of value or exchange is expressed. However, if the agreement be construed as an engagement to pay in something other than money, the law will award a money compensation for a breach of the agreement. There is no claim made of a will-

ingness on the part of the appellants to render any compensation.

The judgment will be reversed, with directions to enter a new judgment for $400. The appellants will recover costs.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

[No. 8456. Department Two. March 26, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED PEACOCK, *Appellant*.[1]

HOMICIDE—EVIDENCE—DYING DECLARATION. A dying declaration made December 10th does not identify with sufficient certainty a prior written statement signed and sworn to December 3d, at a time when deceased was seriously ill but not under a sense of impending death, where, a few hours before death, the deceased, in answer to questions, stated that the "statements made to Mr. S. (the notary) a week ago today" were true; and the same is inadmissible although the statement of December 10th was made under a sense of impending death, in view of the rule that dying declarations must be received with great caution.

EVIDENCE—HYPOTHETICAL QUESTIONS—DISCRETION. It may not be an abuse of discretion to permit physicians to answer hypothetical questions although some of the facts assumed are based upon meager evidence.

APPEAL — REVIEW — INSTRUCTIONS—REQUESTS. Error cannot be based upon the refusal to give certain instructions where no request therefor was made.

Appeal from a judgment of the superior court for Wahkiakum county, Rice, J., entered April 10, 1909, upon a trial and conviction of manslaughter. Reversed.

J. Bruce Polwarth, *John Manning*, *McAllister & Upton*, and *B. E. Leonard*, for appellant.

Frank Oleson and *William Stuart*, for respondent.

[1]Reported in 107 Pac. 1022.

PARKER, J.—The defendant, a practicing physician, is accused of the crime of manslaughter. The facts charged against him are, in substance, that on the 27th day of November, 1908, he unlawfully employed an instrument on the person of Madeline Longtain, she being then pregnant, with intent to thereby produce a miscarriage, the same not being necessary to preserve her life, and did then and there produce a miscarriage upon the person of Madeline Longtain, and by said operation and miscarriage he inflicted upon her person mortal injuries from which she died on the 10th day of December, 1908. Upon a plea of not guilty a trial was had, resulting in a verdict of guilty against the defendant. His motion for a new trial being overruled, judgment and sentence was entered accordingly, and an appeal taken therefrom to this court.

The principal question necessary for us to notice upon this appeal is the alleged error of the trial court in admitting in evidence the dying declarations of Madeline Longtain. The facts upon which this question must be determined are as follows: On December 3, 1908, the deceased made certain statements relating to the treatment of and operations performed upon her by the defendant at and prior to the time charged. These statements were made in answer to questions asked her by E. S. Snelling, and were at the time written down in shorthand by a stenographer, reduced to typewriting, covering some six pages of ordinary typewritten matter, signed by deceased, and sworn to before a notary public.

While these statements were made at a time when the deceased was seriously ill, the evidence in the record falls far short of showing that they were made under a sense of impending death. Learned counsel for the state do not seriously contend that they were so made, or that they would be admissible as dying declarations, standing alone; but it is contended that they were later reaffirmed under such circumstances as to give them all the force of dying declarations and render them admissible in evidence as such. The alleged re-

affirmance of these statements occurred as follows: On the night of December 9th the deceased said to her nurse, in reply to a question, "I don't feel very good. I think I am going to die." The next day, December 10th, at about 11:00 o'clock a. m., Mr. Oleson, the prosecuting attorney, went to the room of the deceased with a stenographer, evidently for the purpose of procuring a dying declaration. At that time the deceased was "dozing," as a witness expressed it, and it was concluded they would return to procure her statement at 1:30 in the afternoon. At that time Mr. Oleson and the stenographer returned, when he asked, and was answered by the deceased, as follows:

"Q. How do you feel Madeline? A. Pretty bad. I think I am going to die. Q. Do you think you are going to die, Madeline, don't you think you are going to get well? A. No, I don't think I am going to get well. Q. Madeline, are the statements you made to Mr. Snelling a week ago today true? A. Yes, they are true."

There was no reference to any prior statements made by the deceased other than that indicated in this last question and answer. The written statements she had signed and sworn to on December 3 were not produced or shown to her, nor were they referred to as statements which had been signed and sworn to by her, nor was the subject-matter of the statements mentioned in the question or answer. She died on December 10th, a few hours after making this last statement.

It may be conceded that the statement made on December 10th was made under a sense of impending death, and so far as the showing in that regard is concerned it would be admissible as a dying declaration, but it will be noticed that this last statement is meaningless except as a reaffirmance of prior statements. Upon the theory that the statements of December 3d were sufficiently identified and reaffirmed by that of December 10th to make them a part of her declaration of December 10th, the learned trial court admitted a part of

them in evidence as her dying declaration. We are then confronted with the single question, Was there such a certain reference to and reaffirmance of the former written and signed statements by the latter, as to make the former in fact her dying declarations, as if they had been actually made or repeated on December 10th?

Dying declarations are to be received in evidence with great caution. As was said by this court in *State v. Eddon*, 8 Wash. 292, 297, 36 Pac. 139:

"The trouble with this character of evidence is, that it is in its nature hearsay evidence and is in practical conflict with the constitutional right of the defendant to meet the witnesses, that testify against him, face to face; and is in conflict with his right to cross-examine such witnesses; and it is only tolerated on the ground of necessity growing out of the fact that murderers, by putting the witnesses, who are generally sole witnesses of the crime, beyond the power of testifying by killing them, will escape the consequences of their crime. It can only be justified on the presumption that the solemn realization of impending and inevitable death will take the place of the solemnity of an oath; and the greatest care and caution ought, therefore, to be exercised in the admission of this character of testimony."

These views have been asserted in varying language by many courts and text writers. *State v. Johnson*, 118 Mo. 491, 502, 24 S. W. 229, 40 Am. St. 405; *State v. Medlicott*, 9 Kan. 357; *Bell v. State*, 72 Miss. 507, 513, 17 South. 232; Wharton, Homicide (3d ed.), p. 975. Not only must great care be exercised when considering the frame of mind of deceased at the time of making the statements, but it must also appear, with a great degree of certainty, that the statements attributed to the deceased are in fact the statements of the deceased. And when it is sought to show that former statements of the deceased were reaffirmed under a sense of impending death, then such statements must be referred to and reaffirmed with such a degree of certainty that there can be no doubt as to what previous statements are meant by the deceased to be reaffirmed. Where the statements sought to be

introduced in evidence are all made at one time without any reference to other previous statements made by deceased, there will usually be but little difficulty in determining what such statements really are; but when the words uttered at the time of the dying declaration are meaningless except as they refer to some former statement, there may be, as in this case, room for doubts to arise upon the question of the identity of the statements previously made and then referred to.

Learned counsel for the state have cited cases from other states in support of the general rule that previous statements may become admissible as dying declarations by reaffirmance by the deceased while under a sense of impending death. They cite the following: *Johnson v. State*, 102 Ala. 1, 16 South. 99; *People v. Crews*, 102 Cal. 174, 36 Pac. 367; *Snell v. State*, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. 723; *Wilson v. Commonwealth*, 22 Ky. Law 1251, 60 S. W. 400; *Mockabee v. Commonwealth*, 78 Ky. 380; *Bryant v. State*, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; *State v. McEvoy*, 9 S. C. 208.

We do not think any of these cases are controlling under the facts presented here. We think in all of them, so far as can be gathered from their language, the prior statements of the deceased, reaffirmed under conditions making it a dying declaration, was identified by the deceased with much greater certainty than was the statement of December 3d identified by the deceased in this case.

In the case of *Harper v. State*, 79 Miss. 575, 31 South. 195, 56 L. R. A. 372, we find a situation somewhat analogous to that here involved. A statement appears to have been prepared in writing with intent that it be signed by the deceased when he came to think he would die. In passing upon the admissibility of this paper as a dying declaration, the court said:

"Moreover, we think a declaration prepared by a person in full possession of his mental faculties, and in confident hope

of recovery, to be signed in possible event of a subsequent conviction of a fatal termination, is too much tainted to be admissible in evidence. Such a paper at the time of its preparation goes for nothing, of course; and when the time comes for execution of it, the tendency of human nature *in extremis* to be consistent and follow a formula, without effort, vitiates it. Such an instrument cannot be said to be the free and voluntary act of the person, originated and executed under a solemn sense of impending death."

See, also, *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693; *Cooper v. State*, 89 Miss. 351, 42 South. 666.

We think no court has gone to the extent of admitting in evidence statements, as dying declarations, made prior to the deceased's conviction of impending death, and claimed to have been reaffirmed by the deceased under a sense of impending death, except where the former statement has been referred to and identified with greater certainty than was shown in this case. We are of the opinion that the learned trial court was in error in admitting in evidence the statement of Madeline Longtain made on December 3d as a part of her dying declaration, claimed to have been made on December 10th.

Little need be said concerning the remaining assignments of error, since for the most part they relate to matters which will not likely occur upon a new trial. Certain hypothetical questions, propounded and permitted to be answered by physicians as expert witnesses in behalf of the state, were objected to by counsel for appellant, upon the ground that the evidence did not tend to show all of the facts assumed by the questions. We think that while the evidence was somewhat meager relative to some of the assumed facts, we cannot say that the court abused its discretion in permitting the questions to be answered. Error is claimed upon the court's neglect to instruct the jury upon certain matters; but no request for such instructions was made, and the errors claimed do not relate to such matters as the court is bound to instruct upon, without request.

It is also contended that defendant's motion for a directed verdict should have been granted. This motion was based upon the theory that the evidence was such that the court should have taken the case from the jury and directed a verdict of not guilty. In this we think there was no error. In view of the fact that a new trial must be granted we deem it unwise to discuss the evidence. We conclude that a new trial must be granted. The judgment is therefore reversed, with directions to grant a new trial.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8488. Department Two. March 26, 1910.]

THE STATE OF WASHINGTON, *on the Relation of John McKee et al., Respondents*, v. A. G. McNEILL, *as Sheriff of Benton County, Appellant.*[1]

EXEMPTIONS—PERSONS ENTITLED—FARMERS. Under a liberal construction of Rem. & Bal. Code, § 563, allowing exemptions to a farmer of a team, harness and wagon, "also farming utensils actually used about the farm," a team, harness and wagon need not be actually used about the farm or the farmer living thereon; it is sufficient if farming has been his principal occupation for years, that he had recently moved to town, sold or traded his homestead, and made arrangements to rent a ranch, intending to go upon and farm it.

EXEMPTIONS—PERSONS ENTITLED—ABSCONDING DEBTOR—QUESTION OF FACT. Whether a debtor has forfeited his right to exemptions by reason of the fact that he was about to leave the state with intent to defraud his creditors presents only a question of fact.

EXEMPTIONS—VALUE—APPRAISEMENT—WAIVER—EFFECT. Under Rem. & Bal. Code, § 572, providing for an appraisement of property levied upon when it is claimed as exempt, a creditor who waives the appraisement and directs the sheriff to hold the property is precluded from raising any question as to the value of the property as stated in the debtor's claim of exemption.

[1]Reported in 107 Pac. 1028.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered July 22, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for a writ of mandate to release exempt property held under a writ of attachment. Affirmed.

H. Dustin, for appellant.

Linn & Boyle, for respondents.

PARKER, J.—On June 4, 1909, under a writ of attachment issued out of the superior court against the relators, the defendant as sheriff seized and took into his possession the following property belonging to them: One brown gelding; one bay gelding; two gray mares; two colts; two sets of double harness; one hack; one wagon; and one wheat ranch. On June 5, 1909, the relators made and delivered to the sheriff a list of personal property belonging to them, verified as being a complete list of all their property. The items of property contained in this list included the property so seized and then in possession of the sheriff, and also certain household goods, and none other. The household goods were clearly within the exemptions of subd. 3, section 563 of Rem. & Bal. Code. At the same time the relators executed and delivered to the sheriff their claim for exemption in writing, demanding that the sheriff set over to them from the property so seized and in his possession, the two mares, one set of harness, and the wagon; claiming the same as exempt to them as farmers; and also demanding that the sheriff set over to them the balance of the property so seized and in his possession, which property they selected in lieu of property not possessed by them which would be exempt under subd. 4, section 563, claiming the same did not exceed $250 in value. The plaintiff in the attachment suit expressly waived his right to have the property appraised, refused to take any action in relation thereto, and directed the sheriff

to continue to hold the same, which the sheriff did, and thereupon this action was instituted seeking to compel the sheriff to deliver the property to the relators. A trial before the court resulted in judgment in favor of the relators, from which the sheriff has appealed.

It is contended by learned counsel for appellant that the evidence does not warrant the conclusion that respondents were farmers at the time of the attachment, within the meaning of subd. 5, of section 563, and that they are not entitled to the team, harness, and wagon, claimed by them as farmers. There was competent evidence tending to show the following: The respondent John McKee had been engaged in farming as a livelihood for twenty years past, and since 1903 had been living on a homestead in Benton county, until the fall of 1908. While living on his homestead, he had no stock or farming implements, and was unable to buy any. He worked some upon his own land and also worked for his neighbors. He caused some fifteen acres or more of his land to be brought under a state of cultivation, and rented his land taking a share of the crop in payment, but continued to live upon it until the fall of 1908, when he moved with his family into the town of Prosser to enable his children to go to school. In the spring of 1909 he traded his homestead for the property here involved and $368 in money. This money was mostly consumed in the payment of debts, and the balance was consumed in purchasing supplies for his family and stock. About this time he made arrangements for leasing a ranch in Franklin county, intending to go there and farm upon it. He was still living in Prosser when the property was seized by the sheriff. While there are circumstances shown tending to contradict some of these facts, we think the evidence was sufficient to warrant the trial court in believing them, as it must have done in rendering the judgment it did.

Counsel argues that since respondents were not the owners of or living upon, a farm, or actually engaged in farming

at the time of the attachment, they cannot successfully claim exemptions as farmers, claiming they were not then farmers within the meaning of subd. 5, of section 568, which reads:

"To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin."

Our attention is particularly directed to the words, "actually used about the farm." We do not think that the spirit of our exemption laws contemplate such a strict construction as counsel seeks to apply to this provision. If a man has for years made farming his principal occupation, and intends to do so in the near future, we think the mere fact that he may not be so engaged, and his team, wagon, and harness are not being used in farming at the time of the levy thereon, he is not thereby deprived of his exemption right under this provision. *Pease v. Price*, 101 Iowa 57, 69 N. W. 1120; *Cleveland v. Andrews*, 5 Idaho 65, 46 Pac. 1025, 95 Am. St. 165; *Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 66 Am. St. 62; *Hickman v. Cruise*, 72 Iowa 528, 34 N. W. 316, 2 Am. St. 256. Following the general rule, this court has liberally construed our exemptions in favor of the poor debtor. *Mikkleson v. Parker*, 3 Wash. Ter. 527, 19 Pac. 31; *Dennis v. Kass & Co.*, 11 Wash. 353, 39 Pac. 656, 48 Am. St. 880; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962, 48 Am. St. 885, 27 L. R. A. 808; *Geiger v. Kobilka*, 26 Wash. 171, 66 Pac. 423, 90 Am. St. 733; 18 Cyc. 1380.

It is further contended that respondents are about to leave the state with intent to defraud their creditors, and are thus deprived of the right of exemptions under Rem. & Bal. Code, § 571. This presents only a question of fact, which we think the evidence justified the learned trial court in resolving against appellant. Some contention is made upon the question of the value of the property claimed as exempt. Section 572 of Rem. & Bal. Code, provides for an appraise-

ment upon the claim of exemption being made upon demand of the creditor. Such appraisement having been waived, as we have noticed, we think the trial court was not called upon to consider the question of value.

We conclude that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8442. Department Two. March 26, 1910.]

R. J. HUSTON, *Appellant*, v. HILEN HARRINGTON, *Respondent*.[1]

SPECIFIC PERFORMANCE—CONTRACTS—UNCERTAINTY—PRINCIPAL AND AGENT. A contract whereby defendant agreed to sell certain corporate stock to the plaintiff, or to whomsoever he may direct, for the sum of not less than $30,000 and as much more as it may be sold for to any other person than the plaintiff, is one of agency, in which the price is left uncertain where no sale was made to a third person, and therefore cannot be specifically enforced.

SAME—CONTRACTS—CONFIDENTIAL RELATION. A contract by defendant to sell to plaintiff certain corporate stock will not be specifically enforced where the plaintiff was acting as defendant's confidential agent in sole charge of the business, and failed to fully inform the defendant of the condition of the property and of an increase in its rental value, and part of the tender to defendant was from money belonging to the corporation paid in advance upon such increased rentals.

Appeal from a judgment of the superior court for King county, Main, J., entered June 17, 1909, in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for specific performance. Affirmed.

Austin E. Griffiths (*Paul Shaffrath*, of counsel), for appellant.

Shank & Smith and *James McNeny*, for respondent.

[1]Reported in 107 Pac. 874.

MOUNT, J.—This action was brought by the appellant to enforce specific performance of a written contract. The cause was tried upon its merits. The trial court dismissed the plaintiff's action, and awarded an affirmative judgment in favor of the defendant. No findings of fact were made by the trial court. The plaintiff appeals.

The contract is a follows:

"In consideration of fifty ($50) dollars, receipt whereof is hereby acknowledged, I do agree to sell to R. J. Huston or to whomsoever he may direct, my entire stock and all my interest in Vashon Investment Co. Inc., at any time within six months from this date or thereafter until I shall have given him ten days' notice in writing to the contrary, and upon the payment to me of the sum of not less than thirty thousand ($30,000) dollars and as much more than said sum as said stock and interest may be sold for to any person other than the said R. J. Huston. The payment of said sum of thirty thousand ($30,000) dollars or more to be not less than half cash and the balance in two equal annual payments with interest thereon, at seven per cent per annum, payable semi-annually. I further agree that the said R. J. Huston shall have the privilege to take for himself or sell to another all of my said stock and all interest in and to said Vashon Investment Co. at the price and upon the terms as above provided and in either event to allow him the usual commission of five per cent on the first ten thousand ($10,000) dollars of the purchase price and two and one-half per cent on the balance of said purchase price. It is understood that the property of the Vashon Investment Co. is a certain lease-hold interest upon lot seven block, twenty-four of the A. A. Denny's addition to the city of Seattle. Said lease executed by Morgan J. Carkeek and wife in favor of Hilen Harrington for a period of twenty-five years, bearing date April 1, 1905, and I further agree to execute any assignment of said lease that may be necessary or required by the purchaser to validate the sale above provided for.

"Dated at Seattle this 2nd of November 1908.

"Hilen Harrington."

It is not claimed by the appellant that the property was sold to any other person, but it is claimed that this is a

specific agreement to sell to R. J. Huston for $30,000. It is shown that Mr. Huston tendered to respondent on March 22, 1899, $15,000 in cash, together with two notes for $7,500 each, due in one and two years, and that respondent refused the tender. The evidence also shows that before the tender was made, respondent offered to take from Mr. Huston $30,000 for the stock, but in addition thereto respondent insisted that he was entitled to the earnings on the stock up to that time. Mr. Huston insisted that the earnings followed the stock. They disagreed upon this point, and this action followed. The evidence also shows that the Vashon Investment Company was organized by the appellant and respondent. The appellant was at all times the active head thereof. The stock was all held by them about equally, with the exception of a few shares held by third parties. The appellant had the whole management and control of the business of the corporation, which consisted of a twenty-five-year lease of the lot mentioned in the contract above set out, upon which lot the company had erected a three-story block which it leased at a monthly rental to tenants. Respondent knew nothing of the business of the company, but relied wholly upon the appellant.

Prior to the time the contract was entered into, the respondent had offered to sell all of his stock in the company at $30,000. The appellant had been negotiating a sale of the property of the corporation at $100,000, which would make the value of respondent's stock about $50,000. Appellant was also negotiating for other tenants of the building, for a long time at a larger rental than the corporation had theretofore been receiving. Respondent did not know, and was not informed, of the contemplated advance in the rental value. The appellant, learning that respondent had offered his stock at $30,000, called upon him and told him in substance that this offer of one-half of the stock of the corporation at that price would injure the sale of the whole property; that he could sell respondent's stock at a much greater sum. The

appellant then wrote the contract above set out, and the same was signed by the parties.

It will be noticed that the contract provides that the respondent agrees "to sell to R. J. Huston or to whomsoever he may direct my entire stock . . . in the Vashon Investment Co . . . upon the payment to me of the sum of not less than $30,000, and as much more than said sum as said stock may be sold for to any person other than the said R. J. Huston." It seems plain that this contract was a contract of agency, and that the price to the agent was indefinite and uncertain. If the appellant became the purchaser, the price was to be "not less than" $30,000. In other words, as between appellant and respondent, no definite price was fixed. It was subject to further negotiations. If the parties to the action had intended to fix the price as between themselves at $30,000, the words "not less than" were surplusage and misleading, and would no doubt have been omitted.

"In all contracts of sale, assignment, and the like, the price is, of course, a material term. It must either be fixed by the agreement itself, or means must be therein provided for ascertaining it with certainty. In the absence of such provision, either stating it or furnishing a mode for fixing it, the agreement would be plainly incomplete, and could not be enforced." Pomeroy, Contracts, § 148.

"In all cases of sale, it is evident that the price is an essential ingredient of the contract, and that when this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement." Fry, Specific Performance (2d ed.), § 335.

"It is settled that the court will not decree the specific performance of a contract which involves the payment of a price, until the price shall be ascertained. The ascertainment of the price must precede a decree." *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380, 384.

"It is a well established rule that courts of equity will not undertake to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume. A suit for specific performance can

only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which a complainant seeks to enforce is vague or uncertain, a court of equity will not interfere, but will leave him to his legal remedy. *Colson v. Thompson*, 2 Wheat. 336, 341. And, where a contract is clearly susceptible of different reasonable interpretations, a court of equity ought not to take the chances of decreeing its specific execution in a way which will possibly do violence to the intentions of the parties thereto." *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, 357.

Furthermore, the appellant and respondent were not dealing at arm's length. The appellant was the confidential agent of the respondent in regard to this property. The appellant had the sole charge and management of it, and the respondent relied upon the appellant in all matters pertaining thereto. It was, therefore, the duty of the appellant to fully inform the respondent as to the condition of the property, and of negotiations then pending which might affect the value of the property. This was not done, and the respondent was led to enter into the contract without knowing that the rental value and the revenue of the property were about to be increased, and were increased, and a large amount of rental collected in advance before the appellant made his tender. In fact, it appears that the cash tender was made from funds which rightly belonged to the corporation.

We think the judgment was right, and it is therefore affirmed.

RUDKIN, C. J., CROW, and PARKER, JJ., concur.

DUNBAR, J., concurs on the ground last discussed.

[No. 8498. *En Banc.* March 28, 1910.]

THEODOR NELSON, *an Insane Person, by his Guardian etc., Respondent*, v. YOUNG-COLE LUMBER COMPANY *et al., Appellants.*[1]

MASTER AND SERVANT—INJURY TO SERVANT—FACTORY ACT—ACTIONS—CONDITION PRECEDENT—NOTICE OF ACCIDENT. Notice of an accident is a condition precedent to an action for personal injuries under Rem. & Bal. Code, § 6595, providing that no action shall be commenced for personal injuries under the factory act unless notice of the accident signed by the employee or some one in his behalf be given to the employer within six months from the time of the accident or within 90 days after recovery if mentally or physically unable to give the notice; and where the injured person became insane, a notice in his behalf signed by an unauthorized person, after the expiration of the six months, no general guardian having been appointed, is not such a notice as is required by the statute.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 3, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Hudson & Holt (*Stevens Bros.*, of counsel), for appellants.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

MOUNT, J.—The plaintiff recovered a judgment against the defendants on account of personal injuries. The defendants have appealed.

It appears that on May 1, 1907, while the respondent was working in a sawmill for the appellants, he fell into an unguarded conveyor chute and was severely injured. His injury confined him to his home until about the 11th of June, when he returned to work for the appellants. He worked only a portion of the time during the months of June, July,

[1]Reported in 107 Pac. 873.

and August, when he quit because the work was too heavy for him, and went to work for the Tacoma & Eastern Railroad Company as section hand. He worked there until December, 1907, when he quit because he was unable to do the work. In January, 1908, he was adjudged insane, and was sent to the insane asylum at Steilacoom, where he has ever since remained. This action was begun on May 1, 1908, by his guardian *ad litem*.

It is alleged that the negligence of the appellants consisted in failure to guard the hatchway to said conveyor when it was practicable to do so. No notice of the time, place, and cause of the injury was given within six months, under the provisions of the factory act under which this action was brought. It is alleged in the complaint, "that by reason of the aforesaid injuries, the mind of the said Theodor Nelson became deranged from the time of said accident, and was and became totally incapable of transacting business from the time of receiving said injuries." It is also alleged that one A. O. Baumeister, on April 18, 1908, on behalf of said Theodor Nelson, caused a notice in writing of the time, place, and cause of the injury to be given to the defendants, and a copy of this notice was attached to the complaint and marked Exhibit A. These allegations of the complaint were denied by the answer, except that it was admitted that the exhibit A was served upon the defendants on April 18, 1908. At the close of plaintiff's case, the defendants moved the court for a directed verdict and for a dismissal of the action, upon several grounds, one of which was that the notice required by the factory act had not been given. The trial court was of the opinion that no notice was required, where the injured person became insane within the period of six months and continued insane thereafter.

The factory act under which the action was brought provides:

"No action for the recovery of compensation for injury under this act shall be maintained unless notice of the time,

place and cause of injury is given to the employer within six months, and the action is commenced within one year, from the occurrence of the accident causing the injury. The notice required by this section shall be in writing, signed by the person injured, or by some one in his behalf; but if from mental or physical incapacity it is impossible for the person injured to give the notice within the time provided in this section he may give the same within ninety days after such incapacity is removed, and in case of his death without having given the notice because of mental or physical incapacity, his executor, or administrator may give notice within thirty days after his appointment." Laws, 1905, page 169, § 9 (Rem. & Bal. Code, § 6595).

This statute is clear that no action shall be maintained unless the required notice is given, and the authorities agree that such notice is a condition precedent to the right of action. 2 Labatt, Master & Servant, § 708; 1 Dresser, Employer's Liability, § 27; Supplement to Dresser's Employer's Liability, p. 65; 5 Thompson, Negligence, § 6231, and cases cited; Reno, Employer's Liability Acts, § 124. No notice of any kind was attempted to be given in this case until April 18, 1908, which was more than six months after the accident which caused the injury. Apparently this notice is not relied upon, for it is contended by the respondent that no notice was required in the case.

It is argued by the appellants that the evidence in behalf of the respondent shows that, for the greater portion of six months following the injury, the respondent was sane and able to go about his business, and therefore should have given the notice required if he intended to hold the appellants liable; and also that the failure to give notice as required by the statute bars a recovery. We need not pass upon the evidence relating to the insanity of the respondent, but may assume that this evidence was sufficient to go to the jury, and also sufficient to show that the respondent was either mentally or physically incapable of transacting business from the time of the accident. The statute says: "The notice required by this section shall be in writing, signed by

the person injured, or by some one in his behalf." This means, of course, some one capable of representing an intelligent person acting within the six months. The next clause provides for persons incapacitated, as follows:

"But if from mental or physical incapacity it is impossible for the person injured to give the notice within the time provided in this section he may give the same within ninety days after such incapacity is removed, and in case of his death without having given the notice because of mental or physical incapacity, his executor or administrator may give such notice within thirty days after his appointment."

The effect of this statute is to require notice to be given within six months, where mental or physical incapacity does not exist; but where such incapacity does exist, then such notice must be given within ninety days after recovery; and when death occurs and notice was not given because of incapacity, then within thirty days after an executor or administrator has been appointed. No provision is made for notice while disability continues, and it is not provided that the action may be maintained without notice in such cases. The requirement of notice is mandatory in any event. The time of the first contingency had passed before any attempt was made to give notice. Neither of the last two contingencies has occurred, and no attempt has been made to give the notice required in such cases. At the time this action was begun the respondent was insane and confined in the insane asylum. No general guardian appears to have been appointed for his person or estate, and no such notice as is required appears to have been given. The question whether a general guardian of an insane person may give the notice provided for in the statute, while the insane person is alive, is not in the case. The absence of proof of the fact that the statutory notice was given, either by the person injured or by some one authorized to do so for him, was fatal to his right of action, and it was therefore error for the court to refuse to dismiss.

The judgment must therefore be reversed, and the cause ordered dismissed, without prejudice.

RUDKIN, C. J., FULLERTON, CHADWICK, GOSE, CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8188. Department One. March 28, 1910.]

DEMENT BROTHERS COMPANY, *Respondent*, v. THE CITY OF WALLA WALLA, *Appellant*.[1]

WATERS AND WATER COURSES—DIVERSION—DAMAGES—EVIDENCE—SUFFICIENCY. In an action against a city for the wrongful diversion of the waters of a creek, the fact that riparian owners were also diverting the water is no defense, where they were using only the amount to which they were entitled and no material damage would have resulted to plaintiff but for the substantial diversion made by the city.

SAME—MEASURE OF DAMAGE. The measure of damages for diverting water from a mill power, where electrical machinery was installed to operate the mill, is the cost of operating the same.

SAME—DIVERSION—DAMAGES—EVIDENCE—SUFFICIENCY. An owner of a mill may recover damages for the diversion of the waters of a stream used for power purposes, although the mill formerly shut down during the dry season because of insufficient water to run the mill, where it appears that while there was a general shortage through the winter months, even during the dry season there had been power enough to elevate and clean grain and run a feed mill.

SAME — DIVERSION — STREAMS — CHANNELS. Where springs, the principal source of a city supply, are fed by waters diverted by the city from a stream, so that the diverted waters can be traced as a part of the surface flow, a lower proprietor on the stream may recover his damages caused by the diversion.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered February 16, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enjoin the

[1]Reported in 107 Pac. 1038.

diversion of the waters of a stream, and for damages. Affirmed.

Sharpstein & Sharpstein, for appellant.

T. P. & C. C. Gose, for respondent.

CHADWICK, J.—Mill creek is a nonnavigable, perennial stream, running through the city of Walla Walla. Since the first settlement of the country its waters have been used for irrigation and power purposes. For more than thirty years respondent or its immediate predecessors in interest have operated a flouring mill with power generated from the waters of the creek. In 1896 the Walla Walla Water Power Company, a private corporation, by means of infiltration wells, subterranean pipes and chambers, developed and diverted a part of the waters of Mill creek for the use of the citizens of Walla Walla. In 1899 the city acquired all the rights, interests, and property of the water company, and through the same devices and by other developments, an increased flow of the waters met the needs of a rapidly growing urban population. Plaintiff began this action to recover damages resulting to it on account of a shortage of water, alleged to have been caused by the unwarranted acts of the city during the years 1904 and 1905, and to enjoin the city from further invasion of its rights. The case was allowed to drag itself along so that, before it was ended, plaintiff obtained leave, and was permitted, to file a supplemental complaint setting up like damages for the years 1906 and 1907. The trial judge made findings and decree affirming the right of respondent to use, unimpaired by any act of the city, the natural flow of the waters of Mill creek for power purposes, and awarded damages in the sum of $5,000 for the years 1904 and 1905, and the sum of $1,935.65 for the years 1906 and 1907.

The testimony is voluminous, and while in some few instances may be said to be conflicting, there is abundant evidence to sustain the decree of the court awarding to the

respondent a right to the use of the waters of Mill creek without impairment or diminution on the part of the city. It is true that the city has undertaken to prove that the principal source of its supply is what is known as Lennon springs, lying near the north bank of Mill creek, which it claims is an independent flow; but there is ample evidence to show that Lennon springs, in so far as the waters flow in any material quantity, are fed by waters taken from what is known as Isaacs mill race, a lateral of Mill creek, which is now owned by the city and has been used for power purposes, and, were such waters allowed to flow uninterruptedly, would reach the head of respondent's race and be available to it for power purposes. So that the only question for us to determine is, whether the testimony sustains the award of damages.

It is first contended that the judgment for damages cannot be allowed to stand, for the reason that many owners riparian to Mill creek have been, and are now, diverting and using water, and that they are equally liable for the damage, if any was sustained. The trial court found that certain of these riparian owners were only using the amount of water to which they were entitled. The testimony shows that others were wrongful users, and that respondent from time to time patrolled the creek and dammed up the heads of their ditches. It is further shown that the substantial diversion was that made by the city at the so-called Lennon springs, and that, but for this, no material damage would have resulted. We believe the findings of the lower court in this regard are correct, and should be sustained.

It is next urged that, in any event, the city is liable for only nominal damages, for the reason that the only shortage proven is that occurring in the summer months, and that the proof shows that respondent's mill had not been accustomed to run during that season of the year for the want of power; in other words, that an award of damages would result in the payment to the respondent for something that it did not

possess and, hence, could not be deprived of. The testimony upon this feature of the case shows that there was a general shortage running through the winter months, and while there was an average season of about six weeks in the summer when the mill was accustomed to shut down, that nevertheless the water had been used to elevate and clean grain and to run the barley and feed mill during that season. In 1905 respondent put in a supplemental electric power and, for the years 1906 and 1907, the court fixed the damages by allowing the amounts expended by respondent for electric power when there was insufficient water to operate the mill at its capacity. This method furnished an exact standard of measurement and, although the amount allowed for the two previous years may seem to be arbitrarily fixed, we think the court might with propriety have fixed a greater sum.

Appellant relies upon the case of *Meyer v. Tacoma Light & Water Co.*, 8 Wash. 144, 35 Pac. 601, saying that to sustain this judgment we must overrule that case. On the contrary, as we read the case, it is not inconsistent with our present conclusion. It was there held:

"There is nothing in the proofs in any manner tending to show that the water was confined to a space immediately below or near the actual bed of the stream upon the surface of the ground, hence the contention of plaintiffs can only be sustained by holding that the entire valley through which it flowed constituted the bed of the stream. . . . There was nothing to warrant any other conclusion than that the water spread itself through the gravel under and on each side of the stream, with no other boundaries than the underlying stratum of which we have spoken. There is nothing to at all indicate where or how within such boundaries the flow is continued. It may have appeared by inference that the waters, or a portion of them, eventually reached the lake, but there was nothing to show that they so reached the lake in any other manner than by percolation through the entire gravel bed of the valley of the stream."

There is no reason for speculation in this case. The waters of Lennon springs, the principal source of supply, were di-

rectly fed by water taken from the Isaacs race, without which appellant's system would have been entirely inadequate to supply the needs of the city. If water can be traced as a part of the surface flow, the rights of the lower proprietor will remain attached, although the water for a time disappears in the channel, or sinks and arises out of it, if it can be traced back to the general course. It is only where the identity of flow is lost that the rule of the *Meyer* case applies.

The judgment is affirmed, with leave granted to the city of Walla Walla to begin condemnation proceedings within ninety days after the remittitur goes down.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 8497. Department One. March 28, 1910.]

POULTRY PRODUCERS' UNION, *Respondent*, v. F. C. WILLIAMS *et al.*, *Appellants*.[1]

CORPORATIONS—OFFICERS—REPRESENTATIONS—IMPUTED KNOWLEDGE. Where a report was made to the directors of a corporation that an employee's books were examined by a bookkeeper on a certain day and that the cash deposited exceeded the receipts, the corporation is put upon inquiry and charged with such knowledge as a cursory examination would have revealed, so as to be bound by representations to the contrary made by an officer.

INSURANCE — INDEMNITY — APPLICATION —REPRESENTATIONS—FALSITY. An employer seeking indemnity or fidelity insurance fails to exercise the necessary reasonable care to ascertain the truth of statements made in the application that the employee's books balanced and were correct, where an examination of a part of the books disclosed more cash deposited than received, and an inspection would have disclosed the inaccuracy of the other books.

SAME—WARRANTIES. An employer's statement, in an application for indemnity insurance that the books of the employee whose fidelity was to be insured were examined on a certain day and were found correct with funds on hand to balance, is a warranty of a material fact, the breach of which avoids the insurance policy.

[1]Reported in 107 Pac. 1040.

SAME—REPRESENTATIONS — KNOWLEDGE OF FALSITY — EVIDENCE—SUFFICIENCY. Such a statement is known, or should have been known, to be false, where only the cash books and bank book were examined, and showed that more cash was deposited than had been taken in, and the cash and funds were not examined, and an inspection of all the books would have disclosed their inaccuracy and a misappropriation of cash or merchandise.

REFERENCE—ACCOUNTING—JURY TRIAL. Where a case involves a long and complicated account, it may be sent to a referee to return the facts without there being any denial of the right to jury trial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered August 6, 1909, upon findings of a referee in favor of the plaintiff, after a hearing before the court without a jury, in an action on a fidelity bond. Affirmed in part and reversed in part.

R. W. McClelland, for appellant Williams.

Graves & Murphy and *Charles H. Winders*, for appellant Surety Company.

J. H. Allen, for respondent.

CHADWICK, J.—This is an action to recover on a fidelity bond executed by one F. C. Williams, an employee of the respondent. On August 24, 1907, the Poultry Producers' Union was organized and incorporated, and opened up for business in Seattle, Washington. Williams was employed as an office man and bookkeeper, and had considerable to do with the outside business of the corporation, such as the sale of its corporate stock and the purchase and sale of the produce handled by the concern. On September 11, 1907, the then manager of the concern, R. M. Wardell, retired, and Williams was made secretary-treasurer and manager of the company. In this position a fidelity bond was required, and an application was made and signed by C. H. Severance, president of the company. Among other questions asked and answered were the following:

"13. When were his accounts last examined? A. September 11, '07. 14. Were they at that time in every respect

correct and funds on hand to balance? A. Yes. 15. Is there now or has there been any shortage due you by bondsmen? A. No."

The application contained the following stipulation:

"It is agreed that the above answers are to be taken as a condition precedent and as the basis of the said bond applied for or any renewal or continuation of the same that may be issued by the Title Guaranty & Surety Company of Scranton, Pennsylvania, to the undersigned upon the person above named."

A bond was thereupon issued, in which it was also recited:

"If the employee's written statement hereinbefore referred to shall be found in any respect untrue this bond shall be void."

On September 23, just one week later, Williams was shorn of his authority and discharged by the board of directors. This action is brought to recover the amount of his embezzlements.

We are met at the threshold of the case by the contention of appellants, (a) that the answers in the application were warranties and, being untrue, the policy is avoided; or (b) if they be held to be representations only, they were made by the president he knowing them to be false, so that appellant company was defrauded, and hence cannot be held under the policy. Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk. A warranty must be strictly true. *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427. A representation need only be substantially true. *Missouri K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117.

"The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent

to a recovery upon the policy or bond to which they relate." *Rice v. Fidelity & Deposit Co., supra.*

Measured by these rules, will a court presume that appellant company would have assumed the risk of insuring the employee had the true state of facts been made known to it? It was advised by the president of the respondent that the books had been examined on September 11, and found to be correct; that it was then found that there were cash and credits to balance the accounts. The evidence shows that the president had no personal knowledge of the books and accounts; that, in fact, no examination upon which a conclusive or even an approximate judgment could be based had been had. The only justification for the answers to the questions quoted above was an inspection and casting up of the cash book and bank pass book. This examination was made by N. M. Wardell, a brother of the general manager, at that time. After qualifying himself as an expert bookkeeper, he testified as follows:

"Q. And I will ask you if during that time, and if so, as near the date as you recollect, at the request of your brother, Mr. R. M. Wardell, you examined Mr. Williams' books? A. I examined a portion of them. The cash book, I believe, and the bank book. . . . Q. State from the result of that examination what you reported to your brother Mr. R. M. Wardell, as a result? A. I made simply a verbal report. I just went over them hurriedly. My report to him was that apparently all money received had been properly deposited, even showing a little more money deposited than had been received. Q. In order to ascertain that what did you do? A. I simply ran up the cash receipts and the bank deposits. Q. The cash disbursements? A. Yes, sir. . . . Q. Were these the only two books in your possession? A. That is all. Q. Did you ascertain how much cash there was in the safe? A. No. Q. Did you ascertain whether there were notes and securities in the possession of the defendant Williams? A. No, I did not. Q. All you did then was to foot up the cash book and bank book and they disclosed to you that there was more money deposited in the bank than appeared to have been taken in? A. That is my recollection of my report to

my brother, that all money had been accounted for in the bank and even a little more. . . . Q. Did you at that time report the incompetency of Mr. Williams? A. I think I talked the fact over with my brother that it was pretty poor bookkeeping when there was more money deposited than the books showed they received. I know it was talked over, the fact that it was a case of incompetent bookkeeping there somewhere."

The cash books did not balance, and an inspection by one at all acquainted with bookkeeping would have revealed the fact that the ledger did not disclose an accurate account of the business. Of the ledger, the bookkeeper (employed at the time Williams became general manager) said: "When I took charge of it it was in such shape I could hardly do anything with it." Williams admits that he is not an expert bookkeeper, and that it was impossible to take care of the books and do the outside work that was put upon him. The reports of two public accountants are found in the record, and they agree that the books are incomplete and inaccurate, one of them saying: "It is easy to see that there was wholesale robbery of cash or merchandise, or both."

It has been held that, in view of that section of our code (Rem. & Bal. Code, § 3686), declaring that the management of a corporation shall be vested in a board of trustees, knowledge on the part of a single officer of facts affecting the risk is not imputable to the corporation, in the absence of proof that it had been brought home to the board. *American Bonding Co. v. Spokane Building & Loan Society*, 130 Fed. 737. But such knowledge as R. M. Wardell had was communicated to the board.

"Q. You reported to the board then at this meeting that apparently more money had been deposited in the bank than was taken in? A. I reported that there were no checks as far as bookkeeping was concerned and urged that we have a competent bookkeeper. Williams said he didn't have time and I guess he didn't have if he had the ability to keep the books properly; but the cash book showed that apparently Williams was perfectly straight."

It is made plainly to appear that there was enough to excite inquiry and to charge respondent with the duty of ascertaining the true state of the books, before making a statement that on a certain date they were found to be correct and that cash and securities were on hand to balance them. It is the duty of an employer seeking indemnity insurance to use ordinary care to ascertain the truth of his statements before making them. *United States Fidelity & Guaranty Co. v. Blackly, Hurst & Co.*, 25 Ky. Law 1271, 77 S. W. 709; *Model Mill Co. v. Fidelity & Deposit Co.*, 1 Tenn. Ch. App. 365. And while he is not to be charged with a knowledge which could only be discovered by an expert (*Remington v. Fidelity Deposit Co.*, 27 Wash. 429, 67 Pac. 989), he is nevertheless charged with such knowledge as a cursory examination would have revealed. *Carstairs v. American Bonding & Trust Co.*, 112 Fed. 620; *Id.*, 116 Fed. 449. For, as was said in the *Remington* case: "Respondent should not be required, against its will, to insure against dishonest employees who are known to be such." It has been held in the following cases that a statement as to the correctness of the employee's accounts is a material statement which, if false, avoids the policy, although made in good faith. *Sullivan v. Fraternal Societies' etc. Union*, 36 Misc. Rep. 578, 73 N. Y. Supp. 1094; *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480.

In the latter case the answer alleged that the company was induced to execute the bond upon the representation in writing, made on behalf of the bank by its cashier, that the teller, for whom the bond was sought, was never in arrears or default, and that his books had been examined on December 31, 1903, and found to be correct. The following conclusion of law was drawn by the court:

"These alleged representations were of existing facts, were material and presumably within the peculiar knowledge of the bank and its officers, and constituted an inducement to the Guarantee Company, on which it had the right to rely, to execute the bond. It was immaterial whether the plaintiff

knew that they were false, or honestly believed them to be true. If a party innocently misrepresent a material fact by mistake, the effect is the same on the party who is misled by it as if he who innocently makes the misrepresentation knew it to be positively false. The real question in such a case is not what the party making the representation knew or believed, but was the representation false, and the other party misled by it. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Grim v. Byrd*, 32 Gratt. 293; *Max Meadows Land & Imp. Co. v. Brady*, 92 Va. 77; and *Wilson v. Carpenter*, 91 Va. 183."

No authority is cited by respondent or argument made to meet this proposition, other than to say:

"We submit the object of examining his accounts was simply to ascertain if he had accounted for the money received, and that only two of his books could throw any light on that subject, that is, his cash book, Exhibit 'A,' which is in evidence, which shows or attempts to show all the cash received, and all the cash paid out. For what the cash was received, and for what it was paid out, and the balance of the cash on hand. The bank book shows that all of this cash on hand had been deposited in the bank to the credit of the Poultry Producers' Union;"

predicating, as will be seen, a justification for the declaration that the books had been found correct upon the proposition that, if the books show cash "long" they were all right, whereas if they had revealed a shortage the representation might be fatal to the right of recovery.

Bookkeeping is an exact science, and a showing that the books do not balance, whether the cash be long or short, should have been enough to awaken the energies of the officers of respondent to find the error, rather than to console themselves with the notion that, if there was an error, it was in their favor and an indication of honesty. Honesty does not require of any man that he turn to the credit of his employer more than is Caesar's. If he makes his accounts to so appear, it behooves the employer to take notice, for if the employee is not taking that which belongs to the employer, he must be taking from the customer more than is the employer's

due. It is unsafe to employ one who will do either. We hold that the representation that the books were examined and found to balance was a warranty of a material fact; that it was known, or should have been known, by the respondent that the representation was false, and that without it appellant would not have assumed the risk.

Judgment was entered against both defendants, and both of them appealed. The surety company being disposed of, the assignments of error which we shall now discuss pertain only to defendant Williams. It is urged that the court was without jurisdiction to refer the case; that by so doing defendant was deprived of his right of trial by jury. It is unnecessary to discuss this assignment. We have only recently held that, where a case involves the examination of a long or complicated account, the case may be sent to a referee to return the facts. Under the statute it is a matter of discretion with the trial judge. *Lindley v. McGlauflin*, 57 Wash. 581, 107 Pac. 355.

The other assignments go to the question whether the testimony sustains the judgment. It may be that the sum charged to Williams is not the exact amount of his shortage, but it is probably as near to it as can be ascertained by any agency, human or divine. The condition of the business was the result of Williams' negligent bookkeeping or positive defalcation, and the injured party should not be held to prove its case beyond the peradventure of a doubt. The amount is approximately correct, and we are disposed to follow the conclusions of the referee and the trial judge upon this question of fact.

The judgment will be reversed in so far as the Title Guaranty & Surety Company is concerned, with instructions to dismiss the case. As to Williams the judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8082. Department Two. March 28, 1910.]

E. E. Peterson, *Appellant*, v. Lone Lake Lumber Company, *Respondent*.[1]

Appeal—Briefs—Printing Findings. An appeal will not be dismissed for failure to print all the findings of fact and conclusions of law in the brief, where appellant has sufficiently complied with the rule of court in respect thereto.

Appeal—Review—Findings—Motion for New Trial—Necessity. In the absence of the evidence or exceptions, the findings are conclusive, and the appellant being satisfied therewith, waives no rights by failing to move for a new trial, but is entitled to a proper judgment on the findings.

Sales—Breach—Damages—Measure. Upon vendee's breach of a contract to purchase logs from the defendant at $6 per thousand, where it appears that defendant's cost in cutting and delivering the logs was $5 and that he subsequently made a contract with a third party therefor at such sum, his profits would have been $1 per thousand, and that is the measure of his damages.

Appeal from a judgment of the superior court for Island county, Still, J., entered March 11, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Willett, Willett & Oleson, for appellant.

Cooley & Horan, for respondent.

Crow, J.—Action by E. E. Peterson against Lone Lake Lumber Company, a corporation, to recover damages for breach of a contract. The trial court in substance found that the plaintiff, being the owner of 1,500,000 feet of standing timber, entered into the following written contract with the defendant:

"This agreement, made and entered into this the 14th day of January, 1907, by and between E. E. Peterson, party of the first part, and the Lone Lake Lumber Company, a corporation, party of the second part:

"Witnesseth: That the said party of the first part agrees

[1]Reported in 107 Pac. 857.

to sell to the party of the second part, all his timber now standing and lying on section five (5), Twn. 29, R. 3 East, W. M., being in Island county, state of Washington, to be delivered at the mill in Island county, belonging to said party of the second part, at the rate of one hundred fifty thousand (150,000) feet per month at the price of six dollars ($6.00) per thousand feet, log scale, to be delivered at the mill of said party of the second part in Island county, state of Washington, and the said party of the second part agrees to purchase from the said party of the first part the said timber, and pay the said party of the first part therefor six dollars ($6.00) per thousand feet delivered at the mill as above stated, said payments to be made as fast as the logs are scaled:"

that thereafter it was agreed between the parties that it should not be necessary for the plaintiff to deliver 150,000 feet of logs per month, but that he might deliver that amount or less as needed and requested by the defendant; that the defendant did not waive that portion of the agreement requiring the plaintiff to deliver 150,000 feet in any one month if requested, it being understood that he should furnish monthly all the defendant could use in accordance with the capacity of its mill, up to the 150,000 feet; that from time to time, until November 5, 1907, the plaintiff delivered, and the defendant received and paid for, 322,000 feet of sawlogs, all that the defendant needed, requested, or could use in its mill; that the defendant has at all times since refused to accept any further logs although the plaintiff has tendered their delivery and has been continually ready, willing, and able to perform his contract; that there is yet standing on the plaintiff's land 1,178,000 feet of timber, log scale, which the defendant by its contract agreed to purchase at six dollars per thousand; that plaintiff cannot obtain in the open market more than two dollars per thousand, and has been damaged in the sum of four dollars per thousand; that 100,000 feet of the timber has been cut and remains upon plaintiff's land ready for delivery; that since the date of the contract, the plaintiff has sold his land, but has reserved

the timber standing thereon and has made a contract to have all of said timber cut and delivered at his option at the mill of the defendant corporation, under such terms and conditions that the total cost of the timber delivered at said mill to the plaintiff would be five dollars per thousand. Upon these findings a final decree was entered, whereby it was ordered that the plaintiff deliver to the defendant corporation the 100,000 feet of sawlogs now cut and lying upon the land, and that the defendant pay plaintiff six dollars per thousand therefor. The plaintiff has appealed.

The respondent has moved to dismiss the appeal for the reason, as it contends, that the appellant has not printed in his brief all of the findings of fact and conclusions of law. The appellant has sufficiently complied with the rule of this court in the matter of printing the findings and conclusions. The motion is denied.

No exceptions to the findings were taken by either party. The only question before us is whether they sustain the final judgment, and, if not, what judgment should be now ordered. There is no theory upon which the judgment of the trial court can be sustained. The respondent admits it to be erroneous, but contends that it cannot be reviewed on this appeal, for the reason that the appellant did not file a motion for a new trial, calling attention to the errors and affording the trial judge an opportunity to correct the same, and that in any event this court cannot order any other final judgment, but that it will only grant a new trial. In the absence of any evidence or exceptions, the findings are conclusive. No reason exists for awarding a new trial, at which evidence would be again offered and, as we must assume, the same facts would be found. The respondent, being satisfied with the findings, has waived no rights by failing to move for a new trial. He now asks, and is entitled to have, the proper judgment entered upon the findings made. It appears that it will cost appellant five dollars per thousand to cut the timber and deliver it at the respondent's mill, where he was

to receive six dollars per thousand. His actual damages, therefore, were one dollar per thousand for 1,178,000 feet, amounting to $1,178. Although the court stated that his damage was four dollars per thousand, we regard that statement as an unwarranted conclusion of law, and not a finding of fact. The specific facts found are that, after making his contract with respondent upon which this action is based, the appellant entered into another contract, presumably with some third party, by which he agreed to pay five dollars per thousand for the cutting and delivery of the logs at respondent's mill. Had respondent accepted the entire 1,500,000 feet of logs, it is evident that appellant's profits would have been one dollar per thousand and no more.

The trial judge made other findings pertaining to certain expenses incurred by the appellant, but we have not stated them for the reason that such expenses were to be assumed by the appellant himself in performing his contract, and his right to recover any damages on account thereof is foreclosed by his recovery of the damages which we now allow.

The judgment is reversed, and the cause remanded with instructions to enter a judgment in favor of the appellant for $1,178.

Rudkin, C. J., Dunbar, Mount, and Parker, JJ., concur.

[No. 8116. Department Two. March 28, 1910.]

T. H. Pack *et al.*, *Respondents*, v. H. N. Peabody *et al.*, *Appellants*.[1]

Appeal—Record—Statement of Facts. In the absence of a statement of facts, error depending upon the evidence cannot be assigned.

Appeal—Review—Amendments—Continuance—Harmless Error. Error in permitting a trial amendment to the complaint cannot be urged where no surprise was shown or continuance asked.

Appeal—Review—Findings. Findings of fact cannot be reviewed in the absence of the evidence.

Appeal from a judgment of the superior court for Cowlitz county, McCredie J., entered February 3, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose logger's liens. Affirmed.

Joseph O'Neill, for appellants.

B. L. Hubbell, for respondents.

Crow, J.—This action was originally commenced by T. H. Pack, William Sutton and Lawrence Powers against James Brownell, to foreclose three separate logger's liens on certain shinglebolts in Cowlitz county. The defendant failed to appear. Judgment of foreclosure was entered, and an execution was issued to the sheriff of Cowlitz county, by whom it was levied upon the shinglebolts. Thereupon H. N. Peabody and G. L. Buland made and delivered to the sheriff an affidavit and claim to the property, accompanied by an approved bond, and the execution was returned unsatisfied. Thereafter when the cause came on for hearing upon the claim made by Peabody and Buland, the trial court made an order directing that they be made parties defendant in the original foreclosure action, which the plaintiff did by serving

[1]Reported in 107 Pac. 839.

and filing an amended complaint. To this amended complaint the defendants Peabody and Buland, and their respective wives, also made defendants, filed a general demurrer, a motion to make more definite and certain, and an answer. On February 2, 1909, the demurrer being overruled, the plaintiffs further amended their complaint, evidently to comply with the requirements of the motion, and the parties immediately proceeded to trial on the issues thus joined. Findings of fact were made in favor of the plaintiffs, upon which a decree of foreclosure was entered against all the defendants. Peabody and wife and Buland and wife have appealed.

The appellants have not caused any statement of facts containing the evidence admitted on the trial or at any of the hearings to be prepared and certified to this court, yet their controlling assignments of error present questions which we cannot consider in the absence of such a statement. For instance, they contend that the trial court erred in refusing to release the shinglebolts upon proof of their ownership by the appellants. We have no record before us showing that any such proof was offered or made. They also contend that error was committed in permitting the amendment to the complaint and immediately forcing the appellants to trial without further time for preparation. There is no showing that any continuance was asked, that they were surprised, that any further time for preparation was necessary, or that the trial court abused its discretion. The other assignments of error are equally without merit. The findings of fact only are before us for consideration. In the absence of evidence they cannot be reviewed. The only question is whether they sustain the judgment. Although they are not very complete, we think, upon the issues raised by the pleadings, the record before us and the findings made, the judgment should be affirmed. It is so ordered.

Rudkin, C. J., Parker, Mount, and Dunbar, JJ., concur.

[No. 8145. Department Two. March 28, 1910.]

SALINA McGREGOR, *Respondent*, v. J. B. JOHNSON *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—COMMUNITY DEBTS—WRONGFUL ACT OF HUSBAND. Where a married man, engaged in the real estate business, acted as plaintiff's agent in the purchase of property, and misrepresented the price paid, thereby wrongfully making a profit over and above his commissions, the principal may recover a community judgment against the agent and his wife for the difference between the price actually paid by the agent and the amount represented by him as paid; since the wrongful profit made by the agent would be community property.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 15, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for fraud. Affirmed.

Wm. Parmerlee, for appellants.

Shorett & Shorett, for respondent.

CROW, J.—Action by Salina McGregor against J. B. Johnson and Annie M. Johnson, his wife, to recover $1,300, difference between the actual price of real estate bought for plaintiff by the defendant J. B. Johnson as her agent and an advance price represented by him and paid by her. The trial court, after hearing the evidence, in substance found, that the defendants, J. B. Johnson and Annie M. Johnson, are husband and wife; that the profits arising from the transaction here involved inured to the benefit of the community; that the defendant J. B. Johnson, being engaged in the real estate business, represented to the plaintiff that, if she would authorize and trust him to purchase real estate for her, he would be able to secure investments below the market value and earn large profits; that, relying on his honesty, ability, and representations, the plaintiff appointed him as her agent

[1]Reported in 107 Pac. 1049.

to purchase real estate, he to receive as his compensation the regular commissions from vendors; that on or about October 15, 1907, he advised her to enter into a written contract with one L. Bear, a spinster, for the purchase of certain real estate for $5,000; that plaintiff executed the contract and paid $1,500 thereon; that on or about October 16, 1907, the same real estate was sold by one A. Youngquist and wife to L. Bear for $3,700, by written contract, in which at the defendant's request, the consideration was recited as $5,000; that L. Bear was a mere dummy in both contracts, neither receiving nor paying any consideration therefor; that her name was used to deceive the plaintiff and defraud her out of the difference between $5,000 and $3,700 which the defendant then and there received in addition to $200, commissions, and that immediately after discovering the fraud the plaintiff demanded the return of $1,300, which the defendants refused. Upon these findings a community judgment was entered in favor of the plaintiff, against both of the defendants, who have appealed.

Appellants' first contention is that the findings are not supported by the evidence, but after reading the entire record we conclude that they must be sustained.

Appellants further contend that the action in effect is one for damages arising out of the alleged wrongful act or tort of J. B. Johnson; that any liability thereby incurred became his separate obligation, and not that of the community consisting of himself and wife. In support of this contention they cite *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688, and *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738. The latter case, in so far as it can be applied to the facts now before us, fails to support the appellants' present contention. In the *Brotton* case the debt incurred arose out of the wrongful act of a constable in making an unwarranted levy and sale which in no way inured to the benefit of the community consisting of himself and wife.

Assuming in the case before us that the appellant J. B.

Johnson should be successful in retaining the $1,300 which he wrongfully obtained, there could be no question but that it would become the community property of himself and wife. Under our statute it certainly would not become his separate property. If we were to hold that the obligation he has wrongfully incurred to the respondent is now his separate debt, it would follow that the community, after receiving a financial benefit from his wrongful acts, could retain the same without being called to account or compelled to make restitution. Such a holding could find no support in either law or reason. The community having received the benefit, should now be estopped from denying its liability.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8324. Department Two. March 28, 1910.]

NORTH COAST RAILROAD COMPANY, *Respondent*, v. JESSE GENTRY *et al.*, *Appellants*.[1]

EMINENT DOMAIN—PUBLIC USE—APPEAL — REVIEW — CERTIORARI. Under the rule that appeal does not lie from an order adjudging a public use in condemnation proceedings, no appeal can be taken from an order refusing to vacate an adjudication of a public use; since a review of the question of public necessity can only be obtained by certiorari.

Appeal from an order of the superior court for Spokane county, Hinkle, J., entered June 28, 1909, refusing to vacate a decree adjudging a public use in condemnation proceedings, after a trial on the merits and the award of damages by a jury. Appeal dismissed.

Merritt, Oswald & Merritt, for appellants.

Danson & Williams and *Hamblen & Gilbert*, for respondent.

[1]Reported in 107 Pac. 1059.

Crow, J.—On December 23, 1908, the North Coast Railroad Company, a public service corporation, filed in the superior court of Spokane county its petition against Jesse Gentry, Estella Gentry, his wife, and others, to condemn certain real estate in the city of Spokane. On January 7, 1909, the Kirkwood Distillery Company, a corporation, after leave obtained, filed its complaint in intervention, pleading its interest as lessee and the damages it would sustain. On the same date an order adjudging a public use was entered. On March 12, 1909, the cause came on for trial on the issue of damages to be assessed, at which time the petitioner railroad company, by written stipulation, agreed to pay the Kirkwood Distillery Company $300 and costs for the loss of its lease, and further agreed to permit the intervener to remain in possession until July 1, 1910. After trial other and additional damages were awarded Gentry and wife, and judgment of condemnation was entered. On April 22, 1909, Gentry and wife filed a motion to set aside and vacate the order of January 7, adjudging the public use, for the reason that the petitioner, by permitting the intervener to remain in possession under its lease, until July 1, 1910, disclosed the fact that it did not immediately, or within a reasonable time, need the property for any public use. This motion, supported and resisted by affidavits, was denied on June 28, 1909. The defendants Gentry and wife now prosecute this appeal from the order denying the motion and refusing to vacate the decree adjudging a public use.

The respondent has moved to dismiss the appeal, for the reason that the order is not appealable. This court has repeatedly held, that the only appeal in a condemnation suit authorized by Rem. & Bal. Code, § 931, is one from the judgment for damages; that upon such appeal the propriety and justness of the amount of damages awarded are the only issues to be reviewed, and that no appeal will lie from an order adjudging a public use, or in fact from any order in

a condemnation proceeding other than one awarding damages. *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673; *Olympia L. & P. Co. v. Tumwater P. & W. Co.*, 55 Wash. 392, 104 Pac. 778; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892. The effect of the appellants' motion to vacate was to again raise the issue of public necessity, and obtain a rehearing thereon. When their motion was overruled, the order made was an adjudication to the effect that the former decree of public necessity had been properly made. The sole and substantial purpose of this appeal is to have this court review the question of public necessity. We have repeatedly held that such a review can only be obtained by certiorari, as under the statute it cannot be obtained by appeal.

The appeal is dismissed.

MOUNT, PARKER, and DUNBAR, JJ., concur.

RUDKIN, C. J.—I think the order should be affirmed. I therefore concur in the result.

[No. 8310. Department Two. March 28, 1910.]

NORTH COAST RAILROAD COMPANY, *Respondent*, v. JESSE GENTRY *et al.*, *Appellants*.[1]

EMINENT DOMAIN—RIGHTS OF LESSEE—PLEADINGS—INTERVENTION. A lessee of property condemned, being entitled to separate damages, may intervene under Rem. & Bal. Code, § 202, providing therefor if any person has an interest in the subject-matter.

EMINENT DOMAIN—APPEAL—HARMLESS ERROR. In condemnation proceedings, the owner is not prejudiced by a stipulation before trial between the relator and an intervening lessee agreeing to the amount of damages to be awarded to the lessee by reason of his leasehold.

EVIDENCE—EXPERTS—COMPETENCY—LAND VALUES. Upon an issue as to the value of certain city real estate, the competency of a real

[1]Reported in 107 Pac. 1060.

estate broker is shown, and it is error to exclude his testimony, where it appears that he had been engaged in the real estate business in the city for 19 years, had bought and sold property for himself and others, and was acquainted with city real estate values, and based his knowledge partly upon recorded prices, including sales made by one of the parties, and of other sales in the vicinity known to him, and had appraised other property one block distant.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 26, 1909, upon the verdict of a jury awarding damages in a proceeding to condemn land for railroad purposes. Reversed.

Merritt, Oswald & Merritt, for appellants.

Danson & Williams and *Hamblen & Gilbert*, for respondent.

Crow, J.—Action by the North Coast Railroad Company, a public service corporation, against Jesse Gentry, Estella Gentry, his wife, and others, to condemn certain real estate in the city of Spokane. After the entry of an order adjudging a public use, the cause was called for trial before a jury for the assessment of damages, and an award was made in the sum of $85,000, upon which judgment of condemnation was entered. From the judgment awarding these damages, the defendants Gentry and wife have appealed. The appeal herein is separate and distinct from a subsequent appeal in the same action, which has this day been dismissed by this court in *North Coast R. Co. v. Gentry, ante* p. 80, 107 Pac. 1059.

The Kirkwood Distillery Company was, by order of court, permitted to intervene and plead a leasehold estate which it held, and damages which it would sustain. The appellants contend that the trial court erred in permitting the intervention and settlement, insisting that they were thereby prejudiced before the jury in the amount of their recovery. The record shows that, during the progress of the trial, a stipulation to which appellants were not parties, was made and announced, whereby a settlement was effected with the intervener, by fixing the amount of its damages and permitting it

to remain in possession until July 1, 1910. Appellants' damages were afterwards awarded by the jury.

A lessee of property sought to be condemned is entitled to compensation for the loss of, or injury to, his leasehold estate, and we see no reason why his separate damages may not be determined and fixed by stipulation with the petitioner in the condemnation proceeding, even though, in the absence of such stipulation, the total damages to the entire estate would otherwise be determined by the jury, and later apportioned to the various parties holding separate interests. The stipulation could not, and did not, prevent the appellants from having adequate compensation awarded them by the jury. We cannot understand how a settlement with the lessee could decrease the amount of damages to which they were justly and legally entitled. The action of the trial court in permitting intervention by the lessee and an adjustment of its damages by settlement could not in any manner affect or prejudice the appellants in their recovery. The intervention was authorized by Rem. & Bal. Code, § 202, which provides that, before trial, any person may intervene in an action or proceeding who has an interest in the matter in litigation. The lessee was certainly interested in the property sought to be condemned, and was properly permitted to intervene for the purpose of having its damages separately ascertained and awarded even by the stipulation, if it could do so.

Appellants offered one Walker Bean, a real estate dealer and broker of Spokane, as an expert witness to testify to the value of the property sought to be taken. Mr. Bean was examined and cross-examined at considerable length as to his competency, with the result that, on the motion of the respondent, his evidence was stricken and withdrawn from the consideration of the jury. His testimony on the issue of his competency is too lengthy to be here quoted. It, in substance, disclosed that he had been in the real estate business in Spokane for a period of nineteen years; that he had

handled, bought, and sold business properties both as agent for others and also as owner and proprietor for himself; that he was acquainted with the values of real estate; that he knew the lots involved in this action, and that he was acquainted with their fair and reasonable market value. Upon cross-examination he, in substance, stated the source of his knowledge as to the values of property in the particular locality here involved; that it was in part based on recorded prices of sales and purchases, including certain sales made to the respondent; that he had kept track of such sales; that he had himself been called upon to appraise other business property, one block distant, not upon a sale, but upon a revaluation; that he knew of other sales in the neighborhood; that he based his opinion partially upon sales made to the respondent railway company and also upon other sales about one block distant.

The respondent's contention was that the witness based his knowledge solely upon sales made to it, without regard to other sales in the same locality, and that he was not competent to testify as an expert. This contention is not sustained by the record. From the entire testimony of this witness we conclude that he was competent, and that his evidence should have been admitted. The facts disclosed upon his cross-examination could have been submitted to the jury for their consideration, in passing upon the weight of his evidence, but his competency was clearly shown. The trial court having committed prejudicial error in rejecting his evidence, the judgment is, by reason thereof, reversed, and the cause is remanded for a new trial.

Rudkin, C. J., Mount, Parker, and Dunbar, JJ., concur.

[No. 8384. Department Two. March 28, 1910.]

JOHN LEHTONEN, *Respondent*, v. MARYSVILLE WATER AND POWER COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACTS—RESERVATION OF TIMBER—TIME FOR REMOVAL—EXTENSION—EVIDENCE—SUFFICIENCY. There is not sufficient evidence of an oral extension of the time reserved within which to remove timber from land sold by the plaintiff to defendant, where plaintiff could not testify that the defendant made any further reply than to say "yes" or nod his head when asked for the extension, leaving an impression that it would be satisfactory, and defendant denied granting any extension.

SAME—EVIDENCE OF EXTENSION—ADMISSIBILITY. Upon an issue as to whether an extension of time had been granted for the removal of timber, evidence as to what the party would have done to protect his interest if the extension had been refused is properly excluded as immaterial.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 27, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action in tort. Affirmed.

Bell, Anderson & McLaren, for appellant.

Padgett & Bell, for respondent.

PER CURIAM.—The plaintiff seeks to recover damages from the defendant on account of timber cut and removed by it from land in Snohomish county belonging to the plaintiff. The cause was tried by the court without a jury, resulting in findings and judgment against the defendant, from which it has appealed.

The facts found by the trial court, so far as necessary for us to notice, are in substance as follows: On August 9, 1905, the appellant, being then the owner of the land upon which the timber in question was situated, entered into a

[1]Reported in 107 Pac. 878.

contract for the sale of the land to the respondent, the purchase price being payable in several installments, the last of which became due August 9, 1907. The contract of sale contained the following:

"Excepting all of the timber lying, standing or being upon said land; and the party of the first part reserves, and is hereby given 2 years in which to remove said timber from said land; and also reserves the right to enter upon, over and across said land for the purpose of removing said timber."

On August 9, 1907, the respondent, having tendered the balance of the purchase price then due, became entitled to a deed to the land under the terms of the contract. The respondent did not grant to appellant any additional time for the removal of the timber from the land. After August 9, 1907, the appellant severed and removed from the land, 225,000 feet of timber, which was of the total value of $787.50, for which sum the judgment was rendered.

It is contended by learned counsel for appellant that respondent had granted to appellant an extension of time beyond August 9, 1907, to remove the timber from the land, and that the court erred in finding to the contrary. The extension of time is claimed by appellant to have been orally given in May or June, 1907, in a conversation between respondent and the president of appellant, relative to which the latter testified upon direct examination as follows:

"Q. Go ahead and tell the court what happened as to the matter of extension of time on your timber contract with Mr. Lehtonen. A. Well, it was in May or June that I wrote Mr. Lehtonen that I wanted to see him about the matter and he came to Bell's office. Q. That was in 1907? A. That was in 1907, and I told him that we might not be able to take this timber off within the time limited by the contract and that we might require a month or two to complete the removal of the timber. . . . That Mr. Williams, to whom we had let the contract for logging the land, had had a strike and his men had quit on him and they had had some dissolution of partnership there, been a delay and he told me it might be impossible for him to remove the timber within the time, and

Mr. Lehtonen by his talk and actions at the time left the impression with me that such an extension was all right, perfectly agreeable. Q. Made no objection to it? A. He certainly made no objections. . . . Q. Did you rely upon this consent? A. I relied upon this extension of time. . . "

And on cross-examination he testified as follows:

"Q. Now just what did John Lehtonen say: A. Well, John —I said— The statement I made to John was that we probably would not have time to remove this, or Williams would not, and Mr. Lehtonen either said 'Yes,' or remained silent; I wouldn't be positive as to that, but he, at least, left the impression, by either nodding his head or saying 'Yes,' to me, that it was satisfactory. Q. I asked you what he said. I don't ask you what impression he left. I asked you what he said. A. Well, I wouldn't swear positively what he said. I don't remember just what he said. Q. You wouldn't swear that he said anything, would you? A. Well, I wouldn't swear that he said anything. If he said anything, he certainly said 'Yes,' and I am of the impression that he said 'Yes.' Q. All you know is, if he did say anything he said 'Yes'? A. I think he either said 'Yes' or nodded his head, just enough to give me the impression it was satisfactory to him. Q. And all you remember about it is that you got an impression? A. Yes, I am quite positive. Q. You don't know whether he said a word? A. I wouldn't swear positively that he said a word."

This is the substance of the entire testimony tending to show there was an extension of time, so far as we regard the testimony material to that question. The respondent testified "I never gave any extension at all," though he admitted there may have been some talk about extension. We think the court was fully justified in finding that there had been no extension of time given for the removal of the timber. Even treating the testimony of the president as undenied, we do not think an extension of time is shown with such degree of certainty as would justify a finding to that effect. It is plain from our decision in this case when it was here on demurrer, *Lehtonen v. Marysville Water & Power Co.*, 50 Wash. 359, 97 Pac. 292, that appellant's right to the timber

remaining upon the land on August 9, 1907, terminated upon that day under the contract of purchase, and no further right could be claimed thereto by appellant except by a new agreement with the respondent extending the time for removal.

Error is claimed upon the court's refusal to permit the president of appellant to answer the following question: "If he had made any objections at this time [meaning conversation in May or June, 1907] to granting the extension, what steps could you have taken and would you have taken toward protecting your right in the timber uncut." We think there was no error in excluding testimony upon that subject. It would throw no light upon the question of whether or not there had been an extension of time.

We are clearly of the opinion that the learned trial court correctly determined the rights of the parties. The judgment is affirmed.

[No. 8398. Department Two. March 28, 1910.]

JOHN B. SHORETT *et al.*, *Appellants* v. CARL SIGNOR, *Respondent*.[1]

PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE. The grantee of lots below the line of ordinary high water on a navigable lake acquires no title thereto and has no preference right to purchase shore lands as an owner of abutting upland.

SAME—STATUTES—ABUTTING OWNERS. Under Rem. & Bal. Code, § 6754, the *bona fide* purchaser of lots below high water mark, from the owner of the uplands, or one claiming through such *bona fide* purchaser, is entitled to the preference right to purchase the shore lands, regardless of the present ownership of the abutting uplands.

SAME—PURCHASE FROM STATE—PROCEEDINGS — APPEAL — AMENDMENT OF APPLICATION. Under Rem. & Bal. Code, § 6620, relating to appeals to the superior court on applications to purchase shore lands, it is proper to allow an application, based upon the ownership of lots below high water mark, to be amended so as to show that the

[1]Reported in 107 Pac. 1033.

applicant had acquired the record title thereto through a *bona fide* purchaser from the owner of the upland, Rem. & Bal. Code, § 6754, providing that such *bona fide* purchaser or persons claiming under him shall have the preference right to purchase the shore lands.

HUSBAND AND WIFE—CONVEYANCES BETWEEN—RIGHTS CONVEYED—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE. A deed from one member of the community to another has the effect to make the land the separate property of the grantee, and this applies to a preference right to purchase shore lands through the conveyance of lots below high water mark, where the community owned the upland, under Rem. & Bal. Code, § 6754, providing that a *bona fide* purchase of such lots from the upland owner gives the purchaser such preference right.

HUSBAND AND WIFE — CONVEYANCE BETWEEN—BONA FIDES—PRESUMPTION. A deed from one spouse to another, reciting a consideration of $10,000, which is not attacked, is presumed to be made to a *bona fide* purchaser for value.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 16, 1909, in favor of the defendant, upon stipulated facts, in an action to determine the preference rights to purchase shore lands. Affirmed.

Shorett & Shorett, *Harry D. Moore*, *Humphries & Cole*, and *Wm. L. Waters*, for appellants.

H. A. P. Myers, for respondent.

CROW, J.—The appellants, John B. Shorett, Levi Webb, Harry D. Moore, J. M. Reid, Abby Reid, his wife, and Charles H. Brunzel, and the respondent, Carl Signor, severally claiming to be upland owners, made applications to the board of state land commissioners to purchase separate lots and parts of lots in block 97 of Lake Union shore lands in the city of Seattle. The preference right to purchase lots 1, 2, 3, and 4 of block 97, is here involved. The board of state land commissioners awarded the north 25 feet of lot 2 to Signor, the next 25 feet of lot 2 to Shorett and wife, the south 50 feet of lot 2 and all of lot 3 to Brunzel, and all of lot 4 to Reid and wife. From these awards Carl Signor appealed to the superior court of King county. When the cause came on for

trial *de novo* in the superior court, the following facts were, upon written stipulation, admitted to be true:

"(2) That on, to wit, the 22d day of June, 1889, B. F. Day and Frances R. Day, his wife, were the owners and in possession of certain real estate in King county, state of Washington, having acquired the same by purchase after marriage, to which said property they on said date made, executed and filed the plat thereof, platting the same into lots, blocks, streets and alleys, a copy of which plat, together with the dedication, description and acknowledgment endorsed thereon, being filed herewith and marked appellants' Exhibit 'A,' being known as B. F. Day's Eldorado Addition to the City of Seattle. That said plat was duly and regularly accepted by the properly constituted authorities. That said B. F. Day and his wife at the date of making said plat were the owners and in possession of all the lands shown therein to the line of ordinary high water of Lake Union. That on the westerly side of block 19 of said plat said grantors dedicated a street eighty (80) feet in width named Lake Avenue. That the government meander line along the western side of said block 19 is above the line of high water. That the line of ordinary high water of Lake Union is east of the center line of said Lake Avenue. That lots 1, 2, and 3, in block 19, as shown upon said plat, are identical with lots 2, 3, and 4 in block 97, Lake Union Shore Lands. That the line of ordinary high water of Lake Union is as shown by the official plat of Lake Union Shore Lands, which is hereto attached and marked Exhibit 'B.'

"(3) That on the 14th day of January, 1890, said B. F. Day made, executed and delivered to Frances R. Day, his wife, a deed to said block 19, Day's Eldorado Addition, together with the appurtenances which deed is of record in Book 91 of Deeds, page 393. That on November 24, 1894, all of said block 19 was mortgaged in due and regular form by said B. F. Day and wife to one Martha A. Miller. That thereafter said mortgage was duly and regularly foreclosed and a sheriff's deed issued in said foreclosure proceedings to said Martha A. Miller. That the above named Carl Signor is and has been since the 4th day of May, 1903, the owner of whatever interest said B. F. Day and wife owned in said property on November 24, 1894, and in possession of said lots 1, 2, and 3, block 19, B. F. Day's Eldorado Addition,

by and through a conveyance from said Martha A. Miller.

"(4) That on the 18th day of January, 1890, said B. F. Day and Frances R. Day, his wife, made, executed and delivered to one Bruce, their deed of conveyance to lot 1, block 1 of said addition, by reference to said plat, together with tenements, hereditaments and appurtenances, with covenants of warranty. That said respondents Shorett and Webb are now and have been since October 2, 1906, the owners of the north half of said lot 1, and the respondent Charles H. Brunzel is now and has been since September 2, 1902, the owner of the south half of said lot 1, block 1, both through mesne conveyances from said Bruce.

"(5) That on the 28th day of August, 1890, said B. F. Day and Frances R. Day, his wife, made, executed and delivered to one Cooney their deed of conveyance to lot 2, block 1, of said addition, by reference to said plat, together with tenements, hereditaments and appurtenances, with covenants of warranty. That said respondents J. M. Reid and Abby Reid, his wife, are now and have been since March 10, 1903, the owners of said lot 2, block 1, through mesne conveyances from said Cooney.

"(6) That on the 11th day of November, 1890, said B. F. Day and Frances R. Day, his wife, made, executed and delivered to one William Moran, their deed of conveyance to lots 1 and 2, in block 8, of said addition, by reference to said plat, together with tenements, hereditaments and appurtenances, with covenants of warranty. The said respondent H. D. Moore is now and has been since the 26th day of August, A. D. 1906, the owner of said lots 1 and 2, in block 8, through a deed from said William Moran and wife, which deed is recorded in Book 481 of Deeds, at page 231; and which deed recited that grantors convey the riparian and littoral rights, including the preference right to purchase the lots adjacent thereto when the same are platted by the state of Washington.

"(7) That from and after the filing of the plat of B. F. Day's Eldorado Addition, lots 1, 2 and 3 of said block 19, were annually assessed for county, state and municipal purposes, and all of said taxes were paid by said B. F. Day and wife, and their grantees of said lots and none of said taxes were ever assessed to, or paid by any of the owners of any of lots 1, 2, and 3, in block 1, or lots 1 and 2, in block 8, B. F. Day's Eldorado Addition.

"(8) That shortly after said Signor purchased said lots 1, 2 and 3, block 19, he built a residence and store upon said lot 2, with concrete foundation, and thereafter resided and still resides thereon; and also constructed a blacksmith shop upon said lot 4.

"(9) That the upland along the shore adjoining said Day's Eldorado Addition raises quickly and rapidly and it was impossible unless considerable expense was incurred in grading, etc., to lay off Lake Avenue eighty (80) feet wide without encroaching somewhat upon the waters of the lake, on account of the adjoining high land.

"Said H. D. Moore does not consent to any of paragraph three (3) down to and including the figures 393 in the 4th line of said paragraph."

The plat of B. F. Day's Eldorado addition shows that the lots in blocks 1 and 8 are separated from Lake Union, by Lake (now Westlake) avenue immediately to the east, and that lots 1, 2 and 3, in block 19, immediately to the east of Westlake avenue, claimed by Signor, are all, or practically all, below the line of ordinary high water. Lots 2, 3 and 4 of block 97, of the shore lands platted by the state, and now in dispute, are substantially the same as lots 1, 2 and 3, in block 19, of B. F. Day's Eldorado addition, to which Signor holds the record title, and which are frequently designated as water lots in the briefs; that a small portion of these so-called water lots consists of upland lying east of Westlake avenue. This contention is disputed by the other applicants, who claim the lots are entirely below the line of ordinary high water, and that Signor has no interest therein or in the fee title to the east half of Westlake avenue. On trial findings were made in favor of Signor and a decree was entered, by which it was adjudged that he had the preference right to purchase the shore lands from the state. From that judgment, the other applicants have appealed.

If all the lots in block 19, platted by B. F. Day, which the respondent, Signor, now claims, are in fact located below the line of ordinary high water, then under the rule announced in *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, Signor

would have no legal title thereto or to the east half of Westlake avenue, nor would he, as an upland owner, be entitled to any preference right to purchase the shore lands. In his original application and statement of facts, filed with the board of state land commissioners, the respondent, Signor, predicated his alleged preference right to purchase upon his claim of title to the lots in block 19, and upon the fee title claimed by him in and to the east half of Westlake avenue. In the superior court he offered in evidence a certified copy of a recorded deed, for block 19 and other property, dated January 14, 1890, from B. F. Day to Frances R. Day, his wife, and was granted permission to amend his application by adding thereto the following allegation:

"Said applicant, if he is not the upland owner, is entitled to purchase said shore lands under the provisions of Sec. 2176 of Ballinger's Code; that is on the 14th day of January, 1890, the owner of the uplands, abutting upon said shore lands, attempted to convey and did convey said shore lands by deed of record in Book 91 of Deeds, page 393, to Frances R. Day, who was a *bona fide* purchaser thereof, and under whom this applicant claims the preference right of purchase."

The appellants now contend that the trial court erred in allowing this amendment. Bal. Code, § 2176 (Rem. & Bal. Code, § 6754), mentioned in the amendment, reads as follows:

"When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser any portion of the tide or shore lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or right so conveyed."

If Signor has the record title, so attempted to be conveyed by the owner of the uplands to a *bona fide* purchaser, he is entitled to the preference right to purchase, and under section 5, chapter 62, Laws of 1901, page 99 (Rem. & Bal. Code, § 6620), referring to appeals from the board of state land

commissioners, we hold that the amendment pleading such preference right was properly allowed.

The respondent contends that, while the community consisting of B. F. Day and Frances R. Day, his wife, still owned the upland, the deed of January 14, 1890, which he introduced in evidence, was executed and delivered; that the record title to the lots in block 19, now the shore land lots, passed to Frances R. Day as her separate property; that respondent has deraigned title from her, and that by virtue thereof he acquired the preference right to purchase the shore lands without regard to the present ownership of the uplands. The deed conveying the water lots in block 19 was executed and delivered to Frances R. Day, by B. F. Day, her husband, while the community consisting of himself and wife still owned the upland, and prior to the execution and delivery of the deeds of Day and wife under which the appellants now deraign their respective titles to the uplands. Appellants, however, contend that, at the date of the deed from Day to his wife for the lots in block 19, he, the grantor, did not own the uplands; that they were owned by the community; that Day's deed in no manner aids the respondent, and that Frances R. Day, the grantee, was not a *bona fide* purchaser within the meaning of the statute.

The legal effect of a deed from one member of a marital community to the other is to convey the community property and title to the spouse who is the vendee, so that it becomes, or is converted into, his or her separate property, in which the community as such ceases to have any further title or interest. Such a conveyance is authorized by Rem. & Bal. Code, § 8766. The deed, although executed by one spouse only, is in law a conveyance by the community to the other spouse who, being the vendee, thereafter holds the realty as his or her separate estate. After the deed from B. F. Day to his wife was made and delivered, the community still held and owned the upland, while the wife held the record title to the lots so attempted to be conveyed as and for her separate

estate. The community is an entity, separate and distinct from either spouse. Title to community property, held in the name of either spouse for the benefit of the community, is clearly distinguished from the title to separate property held by one spouse for his or her benefit, discharged from any claim or right of the community as such. Had the community, as owner of the uplands, attempted to convey the lots in block 19 to some third party, a *bona fide* purchaser, then under Rem. & Bal. Code, § 6754, *supra*, such third party would undoubtedly have acquired the preference right to purchase the shore lands. In other words, the preference right would pass from the community owner of the uplands to such *bona fide* purchaser and his grantees. There is no reason why it would not in like manner pass from the community owner to the spouse acquiring it as separate property, and thereafter to his or her grantee. If not, there would then be in this state at least one species of community property, involving a valuable right, which, under § 8766, *supra*, could not be conveyed to either spouse and become separate property.

Appellants further contend that the deed from B. F. Day to his wife was not an attempt to convey to a *bona fide* purchaser. It recites a consideration of $10,000, which has not been questioned or attacked. In the absence of evidence showing fraud, the deed is presumed to have been made in good faith, for a valid consideration, and to a *bona fide* purchaser.

At the time of the execution of this deed, the Days evidently believed the community owned the water lots in block 19. This being true, and a valuable consideration which appellants do not question appearing in the deed, we are compelled to hold that the community, as owner of the upland, attempted in good faith to convey the water lots, now the shore land lots, to Frances R. Day as a *bona fide* purchaser for value, and that under § 6754, *supra*, the respondent, Signor, who has deraigned title from her, is entitled to the

preference right to purchase the shore lands without regard to the present ownership of the abutting uplands.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8515. Department One. March 29, 1910.]

THE STATE OF WASHINGTON, *on the Relation of John Arthur, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Defendant*.[1]

DIVORCE—ATTORNEY'S FEES—JURISDICTION TO DETERMINE AMOUNT. Rem. & Bal. Code, § 988, authorizing the court to dispose of the property of the parties to an action for divorce does not give the court jurisdiction to determine the questions of compensation arising between the parties and their attorneys; but Rem. & Bal. Code, § 474, leaving such agreements to the parties in civil actions, applies to actions for divorce; hence, in fixing the attorney's fee in divorce, the court considers the circumstances and conditions of the defendant, irrespective of the wife's agreement with her counsel.

SAME. After awarding a wife a divorce the court has no jurisdiction in the divorce action to amend its decree so as to be a final determination between her and her counsel as to his agreed compensation, although when the parties are properly before the court it can determine the validity and amount of the attorney's lien upon the judgment.

SAME—PROHIBITION—WHEN LIES. In such a case, the attorney not being a party, and having no adequate remedy at law or by appeal, prohibition lies to prevent the amendment of the divorce decree in so far as it affects the attorney's right to compensation.

Application filed in the supreme court December 9, 1909, for a writ of prohibition to the superior court for King county, Gay, J., to prevent the entry of a judgment in a divorce proceeding. Granted.

Kerr & McCord, for plaintiff.

Jas. E. Bradford and *Herchmer Johnston*, for defendant.

[1]Reported in 107 Pac. 876.

RUDKIN, C. J.—On the 28th day of October, 1908, one Eleanor Ferguson, through the relator as her attorney, commenced an action for a divorce against her husband, Fred E. Ferguson, in the superior court of King county. The case thereafter came on regularly for trial, and the court made findings of fact and conclusions of law, and entered a decree in favor of the plaintiff, awarding her a divorce, the care and custody of a minor child, certain property and a money judgment, and costs of suit, including an attorney's fee of $100. The court found, among other things, that, "As part compensation for his services in this cause, it is reasonable that the defendant should pay one hundred dollars ($100)," and the conclusions of law and decree followed the findings in that regard. After the entry of the final judgment, the relator filed a notice with the clerk of the court, claiming a lien on the judgment in the sum of $544 for services performed in the action. Thereafter the defendant in the action was cited to appear and show cause why he should not be punished as for a contempt for failure to pay over certain moneys awarded to the plaintiff by the decree. In the answer or return to the show cause order, the defendant set up the lien claim filed by the relator, and thereupon the court cited the relator to appear and show what if any lien he had or claimed upon the judgment. The relator appeared in obedience to the citation or show cause order, and the plaintiff in the action thereupon proposed amended findings of fact and conclusions of law and an amended decree, wherein it was found and decreed that the attorney's fee of $100, allowed by the court in the divorce action, was in full payment for all services performed by the relator for the plaintiff in the prosecution of that action. The court indicated its intention to sign the amended findings and decree, and the relator applied to this court for a writ of prohibition to restrain it from so doing.

The case is now before us for final determination on the return to a show cause order, and on testimony taken before

a referee appointed by this court. If the court below is proceeding without or in excess of its jurisdiction and the relator has no plain, speedy or adequate remedy by appeal or in the ordinary course of law, the writ must issue as prayed, but otherwise the writ should be denied. The respondent contends that it simply proposes to amend its records to conform to the facts and make them speak the truth. If such were the only purpose of the amendments, and no persons were affected thereby except the parties to the action, who are not here complaining, the relator would not be heard to complain. But while in form the court may be proposing to amend its records to conform to the facts, it is, in fact, attempting to adjudicate the rights of parties not before it and over whom it has no jurisdiction.

On the trial of an action for divorce the court may, as between the parties, make such orders as it may deem right and proper for the disposition of the persons, property, and children of the parties, and relative to the expenses of the action. Rem. & Bal. Code, § 988. But this section gives the court no jurisdiction to determine questions arising solely between the litigants and their counsel. Section 474, Rem. & Bal. Code, provides, that the measure and mode of compensation of attorneys and counsellors shall be left to the agreement, express or implied, of the parties, and this section applies to an action for a divorce as well as to any other form of action. A plaintiff in a divorce action may make an agreement with her attorney fixing the amount of his compensation, and, in the absence of an express agreement, the law will imply an agreement to pay the reasonable value of the services performed, and this obligation is not affected or abrogated by the allowance of an attorney's fee in the divorce action, except as to the amount allowed. In fixing the allowance in the divorce action the court is governed and controlled by many considerations, aside from the reasonable value of the services performed. If the plaintiff in the action has made an express agreement with her attorney, the court

will disregard it and will allow only such sum as it deems proper, taking into consideration the ability of the defendant and all the surrounding circumstances. In so far, therefore, as the court below is attempting to enter a judgment in the divorce proceeding which will be final and conclusive as between the plaintiff in that action and her attorney, it is exceeding its jurisdiction; and inasmuch as the relator is not a party to that action, and has no right of appeal, prohibition is the appropriate remedy. Upon application of either the relator or the plaintiff in the divorce action the court below has jurisdiction to determine the validity and amount of the lien claimed by the relator, when the parties in interest are properly brought before it, and this is the measure of its powers and duties. It has no right or jurisdiction to make such an adjudication in the divorce action, and in so far as it is threatening or attempting to do so, the writ of prohibition will issue as prayed. With amendments which will not affect the rights of the relator, or with the merits of the relator's claim, we are not now concerned.

MOUNT, GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8537. Department One. March 29, 1910.]

MALVINA HOELAND, *Executrix of the Estate of Adolph Hoeland, Deceased, Respondent*, v. WESTERN UNION LIFE INSURANCE COMPANY OF SPOKANE, WASHINGTON, *Appellant*.[1]

INSURANCE—LIFE INSURANCE—WARRANTIES. Representations in an application for life insurance relating to the applicant's health are warranties, and not expressions of opinion, where it is expressly stipulated in the application that they are warranted to be true; and a breach thereof avoids the policy, whether known to be false or not.

SAME—CONSTRUCTION OF APPLICATION. An application for insurance answering questions as to enumerated diseases, among them the question "Headaches—severe, protracted, or frequent," must be

[1]Reported in 107 Pac. 866.

construed to mean headaches, severe, protracted, or frequent which were a disease, and the warranty of the answer "no" to such question only warrants that the insured had never had a disease of that character.

SAME—BREACH OF WARRANTY—HEADACHES. It cannot be said as a matter of law that headaches, severe, protracted, or frequent, are a disability or a disease so to as to render an insurance policy void for misrepresenting matters material to the risk.

SAME—BREACH OF WARRANTY—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether there was a breach of warranty in an application for insurance that the insured had never had severe, protracted headaches amounting to a disease, where the company submitted proof that the insured had, for several years before making the application, had frequent and severe headaches.

INSURANCE—WARRANTIES—BURDEN OF PROOF. Where an applicant for insurance warrants that he had made true answers to questions propounded, the burden is upon him of alleging and proving the fact that his answers were not correctly written down; the medical examiner's certificate being only *prima facie* evidence of the fact.

SAME—WARRANTIES—CONSTRUCTION. Warranties in an application for insurance are strictly construed.

SAME—WARRANTIES—BREACH—EVIDENCE—SUFFICIENCY. There is no sufficient evidence to submit to the jury an issue as to breach of warranties that the insured had never consulted physicians, where it merely appeared that he had consulted a doctor to procure glasses, and on one occasion had received from a friend, a physician, a prescription for a headache; since the warranties in the policy related to diseases and not to mere temporary disorders.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 27, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on policies of life insurance. Reversed.

Richard B. Harris (*B. C. Barrington*, of counsel), for appellant.

Danson & Williams, for respondent.

GOSE, J.—On April 8, 1908, the appellant executed and delivered two policies of $5,000 each, whereby it insured the life of Adolph Hoeland. The loss was made payable to the executors, administrators, or assigns of the assured. The

assured died on the 8th day of September, 1908, and seasonable notice of that fact was given to the appellant. It promptly denied liability, and this action was commenced to recover upon the policies. There was a verdict and judgment for the plaintiff, and the defendant has appealed.

The appellant resists recovery upon two grounds, (1) that the insured committed suicide, and (2) breach of warranties contained in the application for the policies. The first clause in the policy recites that the applicant, "in consideration of the application for this bond which is hereby made a part of this contract, agrees to insure the life of Adolph Hoeland," etc. This application begins with the statement:

"This application, made to the Western Union Life Insurance Company of Spokane, Washington, is the basis and a part of a proposed contract for insurance. I hereby declare and warrant that I am in good health and of sober and temperate habits, that all the following statements and answers and all those that I made to the company's medical examiner in continuation of this examination, are by me warranted to be true, and are offered to the company as a consideration of the contract."

At the close of his answers in the medical examiner's report, the applicant certifies that his "answers to the foregoing questions are correctly recorded by the medical examiner." In the medical examiner's report the appellant was asked: "Have you ever had any of the following diseases? Of each illness state date, number of attacks, duration, severity, complications and results." This question is followed by an enumeration of diseases, including epilepsy, paralysis, apoplexy, and diseases of the nervous system. The next question is: "Headaches—severe, protracted, or frequent?" To which the applicant answered: "No." This is followed by numerous inquiries as to other diseases. The applicant was then interrogated and answered as follows:

"Q. Give name and address of physician last consulted. A. Dr. August Caille, New York. Q. When was he consulted? A. Fifteen years ago. Q. State nature of complaint. A.

Severe cold. Q. Duration of complaint. A. About one week. Q. Do you now use, or have you ever used, opiates, chloral, cocaine, or any other narcotic drug? If so, to what extent? A. No. Q. Are you now in good health so far as you know or believe? A. Yes."

The breaches of warranty alleged as constituting the second defense are that each of these answers was false; that the applicant was at the time he made the application, and had been for a long time, afflicted with severe and frequent headaches; that he had often consulted a physician regarding them; that for a long time prior thereto he had been using opiates and other narcotic drugs, and that he was not in good health as he well knew. At the close of the testimony, the court withdrew from the jury all questions relating to any breach of warranties, but submitted the case on the defense of suicide. The jury returned a general verdict for the amount of the policies.

The appellant contends that the answers which we have set out are warranties under the stipulations of the contract, whilst the respondent insists that they are only representations, or the expression of the opinion of the assured, as to the matters inquired of. We think the appellant's contention in this respect is correct. The rule is that, when a representation made by an applicant for insurance is carried into a contract and expressly made a part of it, it becomes a warranty, and its materiality is settled by the agreement of the parties. Elliott, Insurance, § 102; *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427. The difference in legal effect between a warranty and a representation is that the falsity in a warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to some fact material to the insurance, and it must be false or fraudulent. *Weigle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53; Elliott, Insurance, § 114.

Our first duty is to ascertain with precision what the warranty is. The only purpose of the application and the questions propounded was to discover whether the applicant was a desirable risk. The true meaning of the question first propounded is, had the applicant had headaches, severe, protracted, or frequent, which were a disease. The appellant was not interested in knowing whether the applicant had ever had a headache. As its medical examiner well said in testifying in this case, every one has headaches. The appellant, however, was not concerned about trifling ailments which every one has and which are forgotten as soon as the disorder disappears. But it was concerned about diseases. That it was inquiring about diseases is the only logical deduction from the language employed. The warranty then is that the insured never had a disease of the character mentioned.

This view has abundant support in the adjudged cases. In *Black v. Travelers' Ins. Co.*, 121 Fed. 732, the insured warranted that he had never had "any bodily or mental infirmity." He had, however, while a soldier in the Civil War, received a gunshot wound in the back of the head, by which the exterior table of the skull was fractured and a small piece had been removed, leaving a slight depression of the inner table. He was receiving a pension at the date of his application, on account of vertigo and impaired vision resulting from the wound. The court held that the injury could not be held a bodily infirmity as a matter of law, and that such question, together with the fact that the insured was receiving a disability pension when he made the application, was a question to be submitted to the jury. In *Connecticut Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, the application was made a part of the policy. The insured was directed to answer "Yes" or "No" as to whether he had ever had certain diseases, among which was included "affection of the liver," to which he answered, "No." The court held that the company sought to know whether the liver had been

so affected that its ordinary operations were seriously disturbed or its vital powers materially weakened; that it was not contemplated that the insured could recall every instance of accidental disorder or ailment that affected the liver, which lasted but for a brief period and was unattended by substantial injury or inconvenience or prolonged suffering; that unless he had an affection of the liver amounting to a condition so well defined and marked as to materially derange for a time the functions of that organ, the answer was fair and true.

In *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333, 31 S. W. 501, 53 Am. St. 757, 28 L. R. A. 765, the court, in considering the meaning of the words "headaches—severe, prolonged, or frequent," held that, if the disability inquired about was not inherent but was produced by extraordinary conditions such as excessive work, fatigue, and loss of sleep, the answer "No" was not untrue. In *Insurance Co. v. Trefz*, 104 U. S. 197, the applicant answered the question whether he had had any of the enumerated diseases, including "disease of the brain:" "Never sick." It was contended that he had had a sunstroke which was a brain disease. The court said that it was for the jury to determine whether he had had a sunstroke and whether, if so, it was a disease of the brain. A like principle is announced in *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636; *Rupert v. Supreme Court U. O. F.*, 94 Minn. 293, 102 N. W. 715, and *Rand v. Provident Sav. Life Assurance Society*, 97 Tenn. 291, 37 S. W. 7. Evidence was submitted by the appellant tending to show that the insured, for several years before making the application, had had frequent and severe headaches. The question whether they were of such a nature as to be classed as a disease should have been submitted to the jury.

The respondent, however, asserts that, if the contract be construed as a warranty, the applicant did not warrant that the medical examiner correctly recorded his answers. He did,

however, warrant that he made true answers to the questions propounded. If the answers were not correctly written by the medical examiner, the burden of alleging and proving that fact is on the respondent. It is true that the appellant certified that his answers were correctly recorded. The certificate, however, is only *prima facie* evidence of that fact. The medical examiner was the agent of the appellant, and referred to in the application as its medical examiner. Without this statement, however, we cannot shut our eyes to the fact that insurance companies always select the medical examiner. The appellant cannot change the fundamental law of agency by exacting a certificate from the insured stating that his answers are correctly written. Warranties in contracts of insurance are construed strictly, and will not be extended to include anything not necessarily implied in their terms. 16 Am. & Eng. Ency. Law (2d ed.), 927; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 16 Am. St. 893, 7 L. R. A. 217; *Foster v. Pioneer Mut. Ins. Ass'n*, 37 Wash. 288, 79 Pac. 798; *Endowment Rank K. O. P. v. Cogbill*, 99 Tenn. 28, 41 S. W. 340; *New York Life Ins. Co. v. Russell*, 77 Fed. 94.

There was not sufficient evidence as to the applicant having consulted physicians, other than at the time stated in his answer, to carry the case to the jury on that question. The fact that he consulted a doctor and procured glasses is clearly not within the purview of the question asked or the information sought. The prescription for chloral hydrate and bromide of potassium on one occasion, about the year 1903, was given, as the doctor said, because the insured complained that the worry of business had caused sleeplessness and given him a headache. The questions and answers in the application, although carried into the contract by express language, must receive a reasonable construction. The general rule applicable to the interpretation of contracts and statutes, that a construction that leads to absurdities shall be avoided, may well be employed here. As we have said, the

inquiry related to diseases, and the contract cannot be held for naught because a physician, a personal friend of the insured, prescribed for him for a headache occasioned by temporary worry over business, several years before the application was made, and because the insured failed to state that fact. Mere temporary disorders were not within the contemplation of the parties. They are rarely remembered and, if not forgotten, it would hardly occur to an applicant for insurance that they were within the scope of the inquiry. *Blumenthal v. Berkshire Life Ins. Co.*, 134 Mich. 216, 96 N. W. 17, 104 Am. St. 604. The same may be said of the taking of the chloral hydrate and bromide of potassium on the occasion mentioned in the testimony. The issue as to suicide was determined adversely to the appellant and no error is assigned thereon.

The judgment will be reversed, and the case remanded with directions to grant a new trial on the issues raised by the denials and the second affirmative defense.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

[No. 7709. *En Banc.* March 30, 1910.]

SUSANNAH McCORMICK *et al.*, *Appellants*, v. CHARLES SORENSON *et al.*, *Respondents*.[1]

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARIES—CLAIM OF RIGHT—EVIDENCE—SUFFICIENCY. The purchaser of lots, who by mistake takes possession of the wrong property, incloses the same with a fence and erects a house thereon and otherwise improves the property, and maintains possession for over ten years under a claim of right, based under the mistaken idea that he has the correct property, acquires title by adverse possession, although he did not intend to occupy any other land than that described in his deed.

COSTS—APPEAL—FILING BRIEFS. Costs will not be allowed respondents, on affirming a judgment, where they failed to file a brief after being granted permission to do so.

[1]Reported in 107 Pac. 1055.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 10, 1908, upon the verdict of a jury rendered in favor of the defendants, in an action of ejectment. Affirmed.

Troy & Sturdevant, for appellants.

Vance & Mitchell, for respondents.

Crow, J.—Action in ejectment by Susannah McCormick and husband against Charles Sorenson and wife, to recover possession of lots in the city of Olympia. From a judgment in favor of the defendants, the plaintiffs have appealed.

The main contention on which the appellants rely for a reversal is that the trial court erred in overruling their motions for a directed verdict, and for judgment *non obstante veredicto*. At the argument in this court, permission was granted the respondents to prepare and file their printed answer brief. It has not been filed, and we have been deprived of the benefit of any suggestions of their counsel other than those made on the oral argument.

The evidence shows that the appellants hold the record title to lots 3 and 4, in block 1, of Fourth Street Boulevard addition to the city of Olympia, deraigned by mesne conveyances from one T. C. Van Epps, and that they and their grantors have paid all taxes thereon; that the respondents, Sorenson and wife, hold the record title to lots 1 and 2 in the same block, deraigned from one Geo. A. Mottman, and that they and their grantors have paid all taxes thereon; that the lots are numbered in consecutive order from north to south, lot 2 being immediately north of and adjoining lot 3; that in 1893, Mottman sold lots 1 and 2 to one Harry F. Taylor, who, by measurements made with a ten-foot pole, attempted to locate the boundary lines; that the south line of a certain road or highway was the true north boundary of lot 1; that as then used and traveled by the public, the road extended across portions of lots 1 and 2, a fact unknown to Taylor; that by measuring from the south line of the road

as then used, he made a mistake and failed to locate the true boundary lines of lots 1 and 2; that he immediately built a fence on the lines as then incorrectly located; that he and his wife entered into actual possession of the property fenced, which included parts of lots 1 and 2, all of lot 3, and lot 4 except the south seven feet thereof; that they believed they were in possession of lots 1 and 2 only; that they built a dwelling house which extended over a portion of lot 3; that they and their grantees have since been in open, notorious, exclusive, and continuous possession of the property fenced; and the respondents now claim title by adverse possession to the portion of lots 3 and 4 included within the fence; that neither the appellants nor any of their grantors have been in possession at any time since 1893, and that this action was commenced by appellants in August, 1907.

It is apparent from the evidence that, in 1893, Taylor's original intention was to enter upon and take possession of lots 1 and 2 only; that by mistake he then took possession of and improved lot 3 and part of lot 4, and that he and his grantees, including the respondents, have ever since been in possession thereof under claim of right, although they have continuously entertained the mistaken belief that the property so claimed by them was described as lots 1 and 2, and that they have repeatedly attempted to convey it by that description, making no reference to lots 3 and 4 in their various instruments of conveyance. The question now presented is whether, under such circumstances, they held possession under such a claim of right as would ripen into title by adverse possession, or whether by reason of their mistaken idea as to the true description of the property in their possession, and their belief that they were in possession of lots 1 and 2 only, they have failed to acquire title by adverse possession.

Two special interrogatories were propounded to the jury, and answered by them as follows:

"(1) If the defendants and their grantors have claimed to own the land within the fences for ten years or more did

they do so because they believed they were occupying lots one and two? Answer. Yes. (2) Did the defendants or their grantors ever intend to occupy any other premises than lots one and two? Answer. No."

In their brief the appellants contend that as Taylor and wife, the grantors of respondents, purchased from Mottman with the intention of securing lots 1 and 2, and by mistake encroached upon lots 3 and 4, they cannot predicate their claim of title by adverse possession on such mistake; that it is immaterial whether the mistake was an honest one; that it was in any event simply a mistake as to the location of the property purchased; that it never was the intention of respondents, or any of their grantors, to occupy any property other than lots 1 and 2; that they at no time asserted title to any portion of lots 3 and 4, and that they cannot in this action successfully claim title thereto by adverse possession, never having made any claim of right to any portion of lots 3 or 4. In support of these contentions they rely on *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 27 Atl. 149, 35 Am. St. 366, 21 L. R. A. 829, and other cases of those cited in the L. R. A. foot note thereto. The principal case cited, and some of those mentioned in the note, in substance, hold that a mistake will not give title by adverse possession; that in order to obtain such title up to a fence, located beyond the true line, there must have been an intention to go beyond the true line, and that mistake or ignorance of true lines, without meaning to claim beyond them, will not, when discovered, work disseizin of either party. The authorities cited, to some extent, sustain appellants' position, but this court in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, refused to follow the case of *Preble v. Maine Cent. R. Co.*, *supra*, and quoted with approval the following excerpt from *Caufield v. Clark*, 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845:

"If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up

to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

In this action respondents did make claim to all land within the fence. After citing other authorities announcing the same doctrine, this court, in *Bowers v. Ledgerwood*, said:

"As heretofore observed by this court, the question of adverse possession is one of fact; and, though the fence may have been established originally by mistake, if it were followed by a claim to the land and such acts as clearly evinced a determination of permanent proprietorship, the claim is established. The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the acts and declarations of the parties."

While it is true that Taylor originally made a mistake in fixing the lines, and by reason thereof unintentionally entered into the possession of lot 3 and part of lot 4, it is nevertheless apparent from the evidence that his possession thus obtained was immediately followed by a claim of right to the land; that he and his grantees erected a dwelling house and other buildings; that they planted fruit trees and otherwise improved the place; that each of the subsequent purchasers, before buying, went upon the property, saw the inclosure and improvements, intended to acquire the identical land so inclosed and improved, and that their mistake was not as to the particular land claimed or purchased, but as to its true description. These acts, which continued without interruption for a period of more than ten years, and until the commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, back to and including Taylor, and constituted notice to the real owners. The *Ledgerwood* case has been repeatedly followed and approved by this court. *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853; *Thornley v. Andrews*, 45 Wash. 413, 88 Pac. 757; *Weingarten v. Schurtleff*, 51 Wash. 602,

99 Pac. 739; *Schlossmacher v. Beacon Place Co.*, 52 Wash. 588, 100 Pac. 1013.

Although the possession of the respondents' grantor, Taylor, originated in his mistake when attempting to fix the true lines and take possession of lots 1 and 2 only, then purchased by him, the evidence is amply sufficient to show adverse possession in him and in his grantees, under claim of right, which possession has been open, notorious, exclusive and continuous for a period of more than ten years prior to the commencement of this action. The conclusion reached by the jury, as expressed in their general verdict, is not inconsistent with their answers to the special interrogatories, for while it is true that the respondents and their grantors did not intend to occupy any other property than lots 1 and 2, such intention grew out of their mistaken belief that the land they were occupying was lots 1 and 2. The evidence shows that they did intend to occupy and claim title to the identical land fenced, and in their possession. Their mistake was not as to the land to which they asserted their claim of right, but as to its true description. Adverse possession under claim of right to the property fenced was therefore shown, and the motions for a directed verdict and for a judgment *non obstante veredicto* were properly denied.

The above discussion disposes of appellants' other assignments of error, which are based upon instructions given and requested instructions refused. After a careful examination of the entire body of the instructions given by the trial judge, we conclude that they fully, clearly, and correctly stated the law applicable to the issues and evidence, and that they covered all requested instructions which the appellants were entitled to have given. We find no prejudicial error in the record. The judgment is affirmed. By reason of the failure of the respondents to file any brief after being granted permission to do so, no costs will be awarded to them on this appeal.

RUDKIN, C. J., FULLERTON, DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8341. Department Two. March 30, 1910.]

R. T. Ankerson, *Respondent*, v. Lewis P. Larson, *Appellant*.[1]

Vendor and Purchaser—Contracts—Performance by Vendor—Action for Price—Defenses—Title. In an action to recover on a promissory note given as the first cash payment on a sale of land which the vendee sought to rescind, it is immaterial that the title to the land stood in the name of a third party, where at the time of the sale the vendor secured a deed of the lands from the title holder to the vendee, and placed the same in escrow at the vendee's request awaiting deferred payments, and the vendor was able to perform and tendered full performance.

Same—Objections to Title—Waiver—Evidence — Admissibility. The oral and written opinion of an attorney pointing out defects in the title as shown by an abstract of title, is not admissible in evidence upon an issue as to the vendee's right to rescind, where the opinions were acts in the preliminary proceedings long before the execution of the contract, the defects were not pointed out by the vendee to the vendor or corrections requested, and no objections were made to the title, which was satisfactory to the vendee when the contract was made.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 28, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant.

L. L. Westfall, for respondent.

Crow, J.—This action was commenced by R. T. Ankerson against Lewis P. Larson, to recover $1,000, interest and attorney's fees, on a promissory note executed by the defendant. To the complaint, which was in the usual form, the defendant, by way of affirmative answer, in substance alleged that, when the note was signed, the plaintiff agreed to execute and de-

[1]Reported in 107 Pac. 879.

liver to the defendant an abstract of title and a deed for certain real estate, which he was then selling to the defendant; that the consideration for the deed was to be $6,000; that the $1,000 note was to apply thereon; that it was never delivered, but was to be held and retained by plaintiff as a part of the agreement of sale, and returned if the deal was not consummated; that plaintiff failed to deliver a good and sufficient abstract and deed showing and conveying title, within the time stipulated, and that the note should be cancelled for want of consideration.

The plaintiff, by reply, alleged that the note was given in lieu of a cash payment of $1,000 mentioned in a written contract for a sale of the land, the defendant agreeing to pay $6,000 in three installments; $1,000 cash, $2,000 on September 20, 1907, and $3,000 on January 20, 1908, when a deed was to be delivered; that prior to the execution of the written contract, plaintiff furnished an abstract of title which was approved by the defendant; that the defendant defaulted in the deferred payments; that plaintiff is nevertheless willing to waive forfeiture of the contract, and will complete the transfer by the delivery of a good and sufficient deed upon payment of the agreed purchase price. On trial without a jury, findings and judgment were entered in plaintiff's favor, from which the defendant has appealed.

The appellant first contends that the findings are not sustained by the evidence, but after a careful reading of the entire record, we conclude that they must be approved. On the trial the appellant contended that title to the land stood in the name of a third party, the respondent's brother, and that the written contract was invalid for want of an acknowledgment. The evidence shows that a deed from respondent's brother, properly executed, had been placed in escrow, in compliance with appellant's request; that respondent had performed every act necessary to a conveyance of the land, but that appellant had failed to pay the installments of purchase money as they matured; that time was of the

essence of the contract, but that the respondent was willing and ready to waive forfeiture by delivering the deed upon full payment being made by appellant. Under this showing it was an immaterial inquiry on the trial of this action whether the legal title stood in the name of another, or whether the contract was acknowledged. Respondent tendered full performance. The appellant was the only person in default, and it is undisputed that the note was given to meet the first or cash payment of purchase money stipulated in the contract of sale.

The note and written contract were executed on July 20, 1907. The parties had been negotiating for several months previous thereto. Early in May, 1907, the respondent delivered to the appellant's attorney an abstract of title for examination. They prepared and delivered to appellant a letter or written opinion making some objections. On the trial the appellant produced one of these attorneys as a witness, to testify to alleged defects in the title as disclosed by the abstract, and to the uncompleted condition of the abstract itself. Appellant, attacking the title, also offered the written opinion in evidence. He now contends that the trial court erred in rejecting the written opinion and the oral testimony of the witness. The delivery of the abstract, its examination by appellant's attorney, and its return to respondent without any objections being communicated to him, long preceded the execution of the written contract and were acts in the nature of preliminary negotiations. There is no evidence that the respondent's attention was called to any alleged defect in the abstract, that the opinion was delivered or shown to him, or that he was requested to have the abstract extended or to make any corrections in the title. On the contrary, it is manifest from his actions that the appellant was satisfied with the title; that after all these occurrences he accepted the title, entered into the written contract, and at the same time executed and delivered the note in settlement of the first payment. Considering these facts, which are clearly proven, the

evidence offered by the appellant and excluded by the trial judge was irrelevant and immaterial. The trial court found:

"That prior to the making of said contract plaintiff procured an abstract of said premises and at the request of the defendant delivered the same to the defendant's attorneys at Spokane, Washington, for examination, and that the said contract was entered into after all matters of title and other matters pertaining to said sale were made satisfactory to the defendant, and that a deed has been prepared in accordance with said contract and is ready for delivery to the defendant when he has fully paid for the said premises according to said contract."

There is no prejudicial error in the record. Upon the evidence and findings, the respondent is entitled to a recovery. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8468. Department Two. March 30, 1910.]

JACOB ZELLAR, *Appellant*, v. MARIA SIEMENS, *Respondent*.[1]

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS. An order sustaining a demurrer to a petition to vacate a judgment is not final or appealable, no further disposition of the case having been made.

Appeal from an order of the superior court for Adams county, Holcomb, J., entered August 16, 1909, sustaining a demurrer to the petition, in an action to vacate a judgment. Appeal dismissed.

A. B. Wiltse, for appellant.

Miller & Lewis, for respondent.

PARKER, J.—On July 30, 1909, appellant filed in the superior court for Adams county a petition to vacate a default judgment, previously rendered against him in favor of re-

[1]Reported in 107 Pac. 1054.

spondent in that court. Respondent filed a general demurrer to the petition, alleging that it did not state facts sufficient to constitute a cause for vacation of the judgment. On August 16, 1909, the demurrer, being submitted to the court upon argument, was sustained. The record brought here does not show any indication of appellant's election to stand upon his petition and not plead further; nor does it show any order of dismissal of the petition, or any order finally disposing of the matter. The language of appellant's notice of appeal is somewhat involved, and if the record before us showed any final disposition of the matter, we might infer from the language of the notice that it was an attempt to appeal from such final disposition; but since the order sustaining the demurrer is the last act of the court shown by the record before us, we must conclude that this is an attempt to appeal from that order sustaining the demurrer.

It is clear from the statute and our previous decisions that this appeal must be dismissed, because it is not taken from an appealable order. An order sustaining a demurrer is not final, and hence, not appealable. Rem. & Bal. Code, § 1716; *Potvin v. McCorvey*, 1 Wash. 389, 25 Pac. 330; *Olsen v. Newton*, 3 Wash. 429, 30 Pac. 450; *Mason County v. Dunbar*, 10 Wash. 163, 38 Pac. 1003; *Padley v. Gregg*, 26 Wash. 322, 67 Pac. 72; *State ex rel. Small v. Fleming*, 37 Wash. 531, 79 Pac. 1115.

Appeal is dismissed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8567. Department One. March 31, 1910.]

George R. Tindall, *Appellant*, v. Northern Pacific Railway Company, *Respondent*.[1]

Appeal — Review — Harmless Error — Release — Pleading — Evidence. It is not prejudicial error, in an action for personal injuries, to admit evidence of a release of damages not pleaded in the answer, where the release was first properly admitted on cross-examination of the appellant affecting his credibility, and explained by him without any claim of fraud or duress, on redirect examination.

Release — Consideration — Sufficiency. A release of damages, advisedly signed by an injured servant as a condition precedent to, and for the purpose of securing, reemployment, is given upon sufficient consideration, and is binding in the absence of fraud, although no definite time of service was agreed upon.

Release — Mutuality. Such an agreement is not void for want of mutuality because the reemployment was not for a definite time, where the company agreed to allow the employee to work "under the same circumstances as before the accident."

Release — Execution — Validity. A release of damages given by an injured servant in consideration of reemployment is binding upon the servant although not signed by the employer, where the contract was executed by reinstating and continuing him in employment for more than six months.

Appeal from a judgment of the superior court for King county, Gay, J., entered November 13, 1909, granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries, after a trial before the court and a jury. Affirmed.

Heber McHugh and *John T. Casey* (*Milo A. Root*, of counsel), for appellant.

Carroll B. Graves and *Charles H. Winders*, for respondent.

Gose, J.—This is a suit to recover damages for personal injuries sustained by the plaintiff on the 28th day of July, 1907, while in the employ of defendant as foreman of a switching crew. The case went to trial to a jury on the 5th

[1]Reported in 107 Pac. 1045.

day of November, 1909. At the close of the plaintiff's testimony, the defendant challenged the sufficiency of the evidence, and moved for judgment on three grounds: (1) that there was no evidence of defendant's negligence, (2) that the plaintiff assumed the risk, and (3) that it affirmatively appeared that the plaintiff had settled the claim upon which the action was based, before the commencement of the suit. The motion was sustained upon the last ground, and a judgment for costs was entered in favor of the defendant. The plaintiff has appealed.

The record discloses that the appellant has had about twenty-two years' experience in railroad work, five years of which he was in the employ of the respondent; that at the time of the accident he was foreman of a switching crew consisting of five men; that in the discharge of his duties he took three cars from a side track, placed one of them on the main track, and caused the other two to be switched back onto the side track against other cars; that owing to a defective lug in the stationary car, the automatic coupler failed to connect, and the two cars started toward the main track, when appellant took a scantling, two by four in dimensions, and placed it at first under the front wheel of the car and, after that wheel had passed over it, threw it under the rear wheel; that the plank split, and a sliver penetrated his hand, causing the injury complained of.

About two weeks after the accident, the appellant made a report to the respondent on one of its printed forms, stating that the injury was not caused by any defect in the machinery or appliances, or through the negligence of any of the respondent's employees. No officer or agent of the respondent was present when the appellant made the report. It was his own free and voluntary act and statement. On September 24, 1907, the appellant desiring reemployment, as a condition precedent thereto executed a release, in which he reiterated the statements made in his first report, and released and discharged the respondent from all claim for damages for

the injuries he had sustained. The release recited that there was no agreement upon the part of the respondent to continue his employment for any length of time, but that he was "to be simply reinstated and allowed to work under the same circumstances as before the accident." The appellant testified that, before signing the release, he had a conversation with the claim agent of the respondent, who informed him that he could not go to work until he executed the release; and that he signed it in order to get work and get money to pay his bills. The appellant was thereupon reinstated, and continued in the employ of the company until April, 1908, a period of more than six months. This action was commenced in January, 1909.

The appellant first contends that the release was not pleaded, and was improperly admitted in evidence. The error, however, was without prejudice. The release was first properly admitted in evidence in cross-examination of the appellant as affecting his credibility. On redirect examination the appellant explained the circumstances attending its execution, making no claim of fraud or duress, but assigned as the sole reason for its execution the fact that he desired reemployment and could not get it without executing the release. The facts were then before the court, and it was for it to determine its legal effect.

It is next urged that there was no consideration for the release. We cannot agree with this contention. The recoverable damage, if any, was unliquidated and uncertain. That which is of value to one of the parties or a detriment to the other is a sufficient consideration to support a contract, in the absence of fraud. To hold that the release is not binding upon the appellant would, in effect, destroy his power to contract. He desired reemployment by the respondent, and could not obtain it without releasing it from liability for any claim for damages resulting from his injury. He acted advisedly. He understood that it rested with him to determine whether he would stand upon his claim for damages and seek

employment elsewhere, or acquit the respondent of liability and secure reinstatement. He chose the latter course, as he frankly stated, because he wanted to secure employment so that he could pay his bills. This view is supported by the following cases: *Forbes v. St. Louis I. M. & S. R. Co.*, 107 Mo. App. 661, 82 S. W. 562; *Cleveland etc. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485; *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, 42 N. W. 965; *Smith v. St. Paul & D. R. Co.*, 60 Minn. 330, 62 N. W. 392; *Carter White-Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536.

In the *Forbes* case the plaintiff, a railroad employee, received an injury and, in consideration of being reemployed by the railway company "for such time only as may be satisfactory to said company," released it from all claim for any damages he had sustained. It was held that, notwithstanding the reemployment was indefinite in duration, it constituted a sufficient consideration for the discharge of the company from liability. In the *Cleveland* case the plaintiff, a street car conductor, was injured in a collision while in the discharge of his duties. He executed a release to the company upon its agreement to employ him "so long as satisfactory to it, and not otherwise." The court said the consideration was sufficient to give validity to the release. In *Missouri K. & T. R. Co. v. Smith*, 98 Tex. 47, 81 S. W. 22, 107 Am. St. 607, 66 L. R. A. 741, cited by the appellant, a release, executed in consideration of reemployment "for such time only as may be satisfactory to said company," was held to have been executed without consideration. We think the rule announced by the Missouri and Indiana courts is more in consonance with the fundamental law of contracts. It is of the highest importance to the individual that the freedom of contract be not impaired, and that he be given the fullest liberty to determine for himself the question of the sufficiency of the consideration, where no fraud is present and where the consideration does not touch the question of public policy.

The point is made that the contract is wanting in mu-

tuality. This contention is also without merit. *Carter White Lead Co. v. Kinlin*, and *Smith v. St. Paul & D. R. Co.*, *supra*. The precise point urged is that there was no obligation on the part of the respondent to continue the employment for any definite time. The appellant had been employed by the respondent for about five years, and was reinstated and "allowed to work under the same circumstances as before the accident."

The questions of duress and public policy are suggested. The appellant's testimony shows affirmatively, as we have seen, that he voluntarily executed the release. Public policy, we apprehend, is not violated by permitting a person to enter into a contract to perform legitimate labor.

Finally, it is said the respondent did not sign the release, and that it is therefore of no binding force. The release shows on its face that it was not intended that the respondent should sign it. It did, however, reinstate the appellant, and continued his employment for a period of more than six months in consideration of the release. When the appellant resumed work, the contract was an executed one, and he cannot now complain that the release was not signed by the respondent.

The view we have taken of the case makes it unnecessary to consider the questions of the negligence of the appellant and assumption of risk.

The judgment is affirmed.

Rudkin, C. J., Chadwick, and Fullerton, JJ., concur.

[No. 8226. Department Two. April 1, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN M. WILSON, *Appellant*.[1]

CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. An argumentative instruction to the jury is not ground for reversal where it does not misstate any principle of law and from the evidence the jury could not have returned any other verdict.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered March 12, 1909, upon a conviction of the crime of assault and battery, after a trial on an information charging mayhem. Affirmed.

E. K. Pendergast and *Perry D. Smith*, for appellant.

William C. Brown, for respondent.

PER CURIAM.—Upon an information charging mayhem, the defendant was convicted and adjudged guilty of assault and battery, and has appealed.

The undisputed evidence shows that the appellant and one Lee Hager, the prosecuting witness, lived on adjoining farms; that they were not friendly; that on the morning of the trouble involved in this action, the appellant called Hager to take some of his cattle out of appellant's field; that Hager started toward appellant's land to do so, but at all times remained upon his own premises; that appellant, meeting him, made certain charges against Hager, who finally responded by calling appellant a liar; that thereupon appellant, as he expressed it, went through a fence after Hager; that during the fight which ensued appellant bit off a portion of one of Hager's fingers, and otherwise injured him; that appellant was not hurt, and that Hager was the smaller and weaker man of the two.

The only assignment presented is that the trial court erred in one of its instructions to the jury. This instruction

[1]Reported in 108 Pac. 1.

related to an assault committed by one party upon the land of another whom he has assaulted. It is not necessary to quote the instruction at length. Although it was somewhat rambling, argumentative, and not well framed, we cannot hold it so misstates any principle of law applicable to the issues in this case as to constitute prejudicial error. In any event, after a careful reading of all the evidence, including that of the appellant himself, we are satisfied that the jury could not have returned any verdict more favorable to the appellant, even though the instruction had not been given.

The judgment is affirmed.

[No. 8471. Department One. April 1, 1910.]

ORVILLE D. WHARTON, *Respondent*, v. TACOMA FIR DOOR COMPANY, *Appellant*.[1]

WITNESSES—IMPEACHMENT. In an action by an experienced rip sawyer to recover for injuries sustained by reason of a defect in the saw of which he had no notice, after the mill superintendent had testified on cross-examination that he would not put a green hand to work upon a ripsaw without instructions, it is not competent to impeach the witness in this respect, as the matter is collateral to the issue and the party is concluded by the answer of the witness.

MASTER AND SERVANT—ACTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action by one representing himself as an experienced rip sawyer, to recover for injuries sustained by reason of a defect in the saw of which he had no notice, it is error for the court in instructing as to contributory negligence to make the same rest upon plaintiff's knowledge and experience in operating machines of the same kind, since his competency was not a matter in issue.

TRIAL—INSTRUCTIONS. It is not error to refuse instructions covered by the general charge.

[1]Reported in 107 Pac. 1057.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 23, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Hudson & Holt, for appellant.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

FULLERTON, J.—This action was brought by the respondent against the appellant to recover for injuries received by him while operating a ripsaw at the factory of the appellant. At the trial the jury returned a verdict in his favor for the sum of $4,000. Judgment was thereafter entered on the verdict and this appeal taken therefrom.

The action was brought under the act of March 6, 1905, commonly known as the factory act. In his complaint the respondent charged the appellant with negligence in maintaining for use in his factory a ripsaw with a defective guide, which rendered its operation extra hazardous. He alleged that, upon his employment by the appellant, he was put to work patching defective doors; that during the course of his work he was required to use the ripsaw, but was not informed of its defective and extra hazardous condition, and that by reason thereof he was injured when he undertook to operate the same.

It is assigned first that the court erred in admitting certain testimony. The record shows that when the appellant's superintendent was on the stand he was asked on cross-examination whether he had not put inexperienced men to work at this ripsaw without informing them of the dangers connected with its operation, and answered thereto in the negative. In rebuttal, the respondent called one Charles McCoy, when the following occurred:

"Q. When you started to work down at this factory, had you ever had any experience on a ripsaw before? A. No, sir. Q. When you started to run that ripsaw, was Mr. Dore

present? A. He was. Q. Did he give you any instructions as to the operating of that saw? Mr. Holt: What is the object of this? Mr. Metzler: I asked Mr. Dore if he would set a green hand to work upon this saw without instructing him and he said he did not, that if a man was green he would either instruct him or prevent him using the saw, and I wish to show by this witness that this man came here, an absolutely green man, and began to operate this saw and Mr. Dore was standing near there and said nothing to him about it. Mr. Holt: We object to this as immaterial and irrelevant and it is not proper rebuttal. . . . The Court: I will permit him to answer, I don't remember that testimony."

Whereupon the witness answered, "No, sir."

Manifestly the admission of this evidence was error. The matter inquired about had no reference to any matter relevant or material to the issues on trial. The respondent is not contending that he was a green hand put to work on a dangerous machine without warning. His contention is that he, a competent and experienced man, was put to work on a defective machine without being warned of the defect, an entirely different matter. The questions asked Dore, therefore, while possibly not without the pale of proper cross-examination, related to a purely collateral matter on which he could not be impeached. The governing rule in such cases is well stated in 10 Ency. Plead. & Prac. 294, in the following language:

"In order to impeach a witness by proof of contradictory statements made by him, it is essential that such statements have reference to some matter which is relevant and material to the issue on trial. To state the rule in another form, the cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness."

See, also, *Freidrich v. Territory*, 2 Wash. 358, 26 Pac. 976; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *Bailey v. Seattle &*

Renton R. Co., 32 Wash. 640, 73 Pac. 679; *State v. McLain*, 43 Wash. 267, 86 Pac. 390.

The court gave to the jury the following instructions:

"(4) If you find from the evidence that the machine in question was not in repair at the time of the accident to the plaintiff and that by reason of the same being out of repair and dangerous the operation of the same was extra hazardous, and that the plaintiff was injured through the dangers arising from the machine being out of repair, and you should further find that he was in the course of his regular employment while operating the said machine, performed his work with ordinary care, taking into consideration his experience in operating machines of the kind in question, then in that case you are to find the verdict for the plaintiff."

"(15) The burden of proving contributory negligence rests upon the defendant. In considering the question as to whether or not the plaintiff was guilty of contributory negligence in the operation of the saw, you are to take into consideration his experience in operating the saw, his knowledge of the defects, if any, in the guide, his knowledge of the manner in setting the guide, if any, and whether or not the plaintiff undertook to perform his work in splitting the rail in the usual and ordinary way of one of his experience and knowledge of the machinery in question."

The appellant complains, we think justly, of these instructions for the reason that they make the appellant's liability rest in part upon the respondent's experience and knowledge of the machinery in question; that is, the jury are told that in considering the question of contributory negligence on the part of the respondent, they may take into consideration the respondent's "experience in operating machines of the kind in question," and "his experience and knowledge of the machinery in question." These qualifications are unwarranted because wholly without the issues. As we pointed out in another place, the respondent does not rely for recovery on his lack of experience with machinery of this class, or with this particular machinery. On the contrary, he is estopped from doing so. When he engaged to do the work he undertook to do, he impliedly represented

that he was competent and skilled in that character of work, and familiar with the use of the tools and machinery necessary to be used in doing the work. Hence, he must, and in fact does, rely for recovery on an undisclosed defect in the machine furnished him with which to work which rendered its operation extra hazardous. When, therefore, the court found it necessary to introduce in his charge some standard of comparison, he should have used the standard of an ordinary prudent person having knowledge of such machinery and its mode of operation, not one having the respondent's perhaps limited knowledge.

We find no error in the refusal of the court to give the requested instructions. In so far as they are within the issues and correctly state the law of the case they are covered by the instructions given.

For the errors noted, the judgment is reversed and a new trial awarded.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8385. Department Two. April 2, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. MOSES CLARK, *Appellant*.[1]

INDICTMENT AND INFORMATION—REQUISITES—VERIFICATION. The verification of an indictment is sufficient when the jurat is signed by the deputy clerk as such.

HOMICIDE—DEGREES—JUSTIFICATION—BURDEN OF PROOF—INSTRUCTIONS. In a prosecution for homicide, it is proper to instruct that upon proof of the killing being established beyond a reasonable doubt, the presumption of law is that it was murder in the second degree, and that the burden is upon the defendant to justify it or reduce it to manslaughter, where there were other proper instructions as to the presumption of innocence, burden of proof, and the definitions of the various degrees of homicide.

[1]Reported in 107 Pac. 1047.

Criminal Law—Trial—Jurors—Separation. Rem. & Bal. Code, § 2159, providing that jurors shall not be allowed to separate except by consent of the accused, applies only to jurors sworn to try the cause, and not to jurors sworn on their *voir dire*, as to whom it is discretionary to allow a separation on adjournments before the panel is complete.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered February 20, 1909, upon a trial and conviction of murder in the second degree. Affirmed.

Lovell & Davis, for appellant.

John Truax, for respondent.

Crow, J.—Upon an information charging murder in the first degree, the defendant was convicted of murder in the second degree, and has appealed from the judgment and sentence entered thereon.

The appellant first contends that the information is insufficient for want of a proper verification, the deputy clerk of the superior court having signed the name of the clerk to the jurat by himself as deputy. The verification is sufficient. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. White*, 12 Wash. 417, 41 Pac. 182.

Appellant's next contention is that the trial court erred in giving the following instruction:

"I instruct you, as a matter of law, that if a homicide, that is, the killing of one human being by another, is proven beyond a reasonable doubt, as explained to you, the presumption of law is that it is murder in the second degree; and if the state would elevate it to that of murder in the first degree it must establish all the statutory characteristics of murder in the first degree; and, on the other hand, if the defendant would reduce it to manslaughter, or justify it, the burden is upon him so to do."

Appellant's counsel in their brief concede that this instruction has heretofore been approved by this court, but contend that it is nevertheless erroneous, as it in effect with-

draws from the consideration of the jury that presumption of innocence which prevails throughout the trial, and amounts to a practical destruction of the rule of evidence that the burden of proof is on the state to establish each and every essential element of the crime charged. Other and previous instructions given by the trial judge clearly defined and distinguished the crimes of murder in the first degree, in the second degree, and manslaughter. The jury had also been instructed, properly and clearly, upon presumption of innocence, reasonable doubt, and burden of proof. This being true, they could not have been misled or confused on these subjects. The instruction upon which error is now assigned is in harmony with, and follows, our former rulings. In *State v. Payne*, 10 Wash. 545, 39 Pac. 157, after stating, and rejecting as unsound, the rule announced by Mr. Wharton, we said:

"It is conceded by all the authorities that, under the old common law rule, the killing having been shown, it would be presumed that murder had been committed. If this was the rule at common law, at a time when the mouth of the defendant was closed, and he was unable to explain the circumstances surrounding the killing, there would seem to be greater reason for its existence at the present time, when it is in his power to fully show the circumstances surrounding the transaction. The premeditation required to constitute murder in the first degree is a distinct element, having no relation whatever to the fact of the killing, and for that reason all of the authorities hold that no presumption of murder in the first degree flows from the proof of the killing; but as to murder in the second degree the reasons which induced the holding at common law still have force. Every one is presumed to intend the natural and necessary results of his actions. If he kills another he must, in the absence of a showing to the contrary, be presumed to have intended to kill him. And while it is true that even although he did intend to kill he may not be guilty of murder, or of any other crime, yet if he is not, it is by reason of some fact in justification of his action, the burden of proving which public policy demands should be cast upon him. If it is held that the fact

of killing does not raise the presumption that it was malicious, the administration of criminal justice will be greatly interfered with."

See, also, *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *State v. Johnny Tommy*, 19 Wash. 270, 53 Pac. 157; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489. Nothing in the instruction given indicates a violation or abandonment of the old, well-established, and elementary rule that a defendant is presumed innocent of any crime until guilt is proven beyond a reasonable doubt. The act of homicide, committed by appellant, having been established beyond a reasonable doubt, the instruction given was properly submitted to the jury for their consideration and guidance in weighing the evidence and arriving at their verdict.

At one time, while the jury were being examined on their *voir dire* and selected to try this cause, eleven of the jurors had been passed for cause, and as to them the state and appellant had each waived peremptory challenges. Thereupon the venire being exhausted, an adjournment was had until the following morning. During this adjournment, the eleven jurors were permitted to separate. The appellant now contends that the trial judge erred in permitting such separation. Section 2159, Rem. & Bal. Code, provides that:

"Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county."

This section is applicable only to juries sworn to try a cause, and not to jurors sworn on their *voir dire* to answer touching their qualifications to serve. *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620. The record shows that appellant interposed no objection to the separation of the jurors at the time of adjournment. No jury had then been impaneled, no evidence had been offered on the merits, nor was there any jury, until twelve qualified men had been sworn to

try the cause in the manner provided by law. It would have been a proper exercise of discretion for the trial judge to have prevented any separation of the jurors who were being examined on their *voir dire*, but we are not aware of any statute requiring him to make any such order, nor can we hold that he was guilty of any abuse of discretion in permitting them to separate, no prejudice being shown. No improper conduct on the part of the eleven jurors, or of any person with whom they may have come in contact, has been shown or suggested; nor has it been made to appear that the appellant was in any manner deprived of any of his rights.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and PARKER, JJ., concur.

[No. 8490. Department Two. April 2, 1910.]

ARCHIE R. GALBRAITH, *Appellant*, v. ADAM WEBER *et al.*, *Respondents*.[1]

PRINCIPAL AND AGENT—AUTHORITY—SALE—APPARENT AUTHORITY TO FIX PRICE. Where the owner of a horse intrusted it to an agent to take to a place one hundred miles distant, where he had exclusive possession of the horse and certificates of its registration for six or eight weeks, for the purpose of selling it and making delivery to any purchaser he might find, it is a question for the jury to determine whether the agent was clothed with apparent authority to agree upon the price; and the fact that he first asked $3,000 and sold it for $1,000, is not sufficient to suggest to the purchasers that he was exceeding his authority.

SAME—APPARENT AUTHORITY TO TAKE NOTES. Where an agent was orally authorized to sell a horse in his possession, and take notes in payment, without any special instructions as to the form of the notes, it is for the jury to determine whether he had apparent authority to take notes payable to himself.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 29, 1909, upon the verdict of a jury rendered in favor of the defendants, in an action of replevin. Affirmed.

[1]Reported in 107 Pac. 1050.

Peacock & Ludden and *M. B. Malloy*, for appellant.
Arthur McGuire and *Sam B. Hill*, for respondents.

PARKER, J.—This is an action to recover possession of a horse. There is involved the question of the authority of an agent of plaintiff on making the sale of the horse to the defendants. Upon a trial before the court and a jury, a verdict was returned in favor of the defendants. Plaintiff's motion for a new trial being denied, judgment was entered upon the verdict. Plaintiff thereupon appealed to this court.

There is competent evidence tending to show the following facts: The appellant resides near Spokane, and the respondents reside near the town of Quincy, more than one hundred miles distant from Spokane. Prior to this controversy appellant and respondents were entire strangers to each other. Early in February, 1906, one W. C. Boquet came to Quincy with the horse in his possession, and offered it for sale for $3,000. He had in his possession, with the horse, two certificates of registration, one issued by the secretary of "The American Shire Horse Association," the other issued by the secretary of "The Shire Horse Society," of London, showing the pedigree of the horse. Boquet exhibited the horse in and about Quincy and continued his efforts to find a purchaser for a period of six or eight weeks. Respondents knew of this and then offered him $1,000 for the horse. Boquet then told respondents that he hadn't authority to take $1,000; that he would have to consult Mr. Galbraith; and that he would go into town and telegraph to Galbraith. The next day he informed respondents that he had a telegram from Galbraith saying it would be all right to accept $1,000. The sale was then consummated for that sum, on the 27th day of March, 1906. The horse, the two certificates of registration, and a bill of sale, executed upon a form which Boquet evidently had in his possession for that purpose, were delivered by him to respondents. The bill of sale was signed "Archie R. Galbraith W. C. Boquet Agent." In payment of the horse, re-

spondents gave their two promissory notes for $500 each, payable to W. C. Boquet, which they delivered to him. The appellant never had any communication whatever with respondents until he visited Quincy a year later. The only knowledge respondents had concerning Boquet's authority was such as they might infer from the facts as above related.

We now turn to the facts occurring at the other end of the line. The horse being the property of appellant, was by him placed in the possession of Boquet for the purpose of taking it to Quincy to sell, where it was taken by Boquet as we have stated. Appellant also then gave to Boquet the two certificates of registration to be delivered to the purchaser. Appellant valued the horse at $3,000, and evidently desired to sell it for that sum, but it is not shown that Boquet was instructed by appellant to sell it for no less sum. Boquet was authorized to sell it on time and take good notes in payment. Appellant says Boquet was not authorized to sell it for cash, but we think the circumstances shown would warrant the jury in believing Boquet did have authority to sell it for cash.

Soon after the sale, Boquet returned to appellant at his home near Spokane and delivered to him three promissory notes for $900 each, purporting to be signed by respondents, Boquet representing they were given in payment of the horse. These were accepted by appellant, he believing them to be genuine, and no objection was made to the price. Appellant made inquiry by correspondence with banks where respondents were known and received favorable reports as to their financial worth. Soon thereafter Boquet disappeared. Appellant's counsel state in their brief that Boquet cashed or discounted the two $500 notes at a bank before disappearing, though the evidence does not clearly so show. This fact, however, is of little consequence, since it is not denied but that the notes have been paid or are still legal obligations against respondents. Upon the falling due of the first of the

$900 notes in March, 1907, they were discovered to be forgeries, and appellant then first learned of the sale of the horse for $1,000 and the giving of the two $500 notes to Boquet in payment thereof. Thereupon appellant visited respondents at Quincy and demanded the possession of the horse, claiming that Boquet had no authority to sell it for $1,000, and also that he had no authority to take the notes payable to himself.

Learned counsel for appellant assign error upon certain instructions given and refused by the trial court relating to general and special agency, and the exercising of apparent authority by an agent. Error is also assigned upon the court's refusal to direct a verdict in favor of appellant. The substance of counsels' contention upon these assignments, as we understand them, is that the evidence did not warrant the giving of any instruction upon the question of general agency, or upon the question of the exercise of apparent authority by an agent, and that the evidence does not support the verdict. It is argued that the evidence does not show that Boquet possessed the authority assumed by him in making the sale, and that his apparent authority was not such as to justify the respondents in dealing with him in the manner they did.

The difficulty in a case of this character is in applying the general rule of apparent authority to the facts of the particular case. From the foregoing statement of the facts, which the evidence tends to show and we think the jury were warranted in believing, it will be seen that this case presents a question of apparent authority in the agent, rather more than one of actual authority, so far as the question of price and manner of payment thereof are concerned. The authority to take the horse to Quincy for the express purpose of selling it to whomsoever Boquet could induce to buy it is conceded. The question of Boquet's apparent authority to agree upon the price and to receive payment by notes payable to himself are the questions concerning which we are to inquire as to whether or not the evidence was such as to make them

questions of fact for the jury. Let us first notice the general principles of law governing cases of this character. We find them well stated by Justice Wiswell in *Heath v. Stoddard*, 91 Maine 499, 40 Atl. 547, 549, as follows:

"A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Ency. Law (2d ed.), page 989, and cases cited.

"Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal. *Griggs v. Selden*, 58 Vt. 561; *Towle v. Leavitt*, 23 N. H. 360 (55 Am. Dec. 195); *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5.

"For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted, with an apparent authority which would protect an innocent purchaser?

"In *Pickering v. Burk*, 15 East, 43, quoted by Mellen, C. J., in *Parsons v. Webb*, 8 Maine 38, Lord Ellenborough says: 'Where the commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe.' "

Along the same line, in the text of 31 Cyc. 1333, we find the following:

"The apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority."

We will first notice Boquet's apparent power to fix the purchase price. Where the agent has exclusive possession of the property of his principal with authority and for the express purpose of selling it to any purchaser he may find, as in this case, we think a purchaser from such agent would clearly have the right to rely upon the agent having power to agree upon the purchase price. 2 Enc. L. & P. 1001; Mechem, Agency, § 362; 1 Clark & Skyles, Agency, § 245; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980.

It is argued that since Boquet had informed respondents, before the sale, that he did not have authority to sell the horse for $1,000, this was notice to them that he exceeded his authority in selling for that price. But this argument loses its force when we are reminded that Boquet told respondents the following day that he had a telegram from appellant saying it would be all right to accept $1,000. So after all, respondents had no information as to the price Boquet had authority to sell for, other than what Boquet himself told them. It is further argued that the great difference between $3,000, previously asked, and $1,000, finally accepted, was sufficient to suggest to respondents that Boquet was probably exceeding his authority. There is no evidence in the record to the effect that Boquet ever told respondents that he was not authorized to sell for less than $3,000. Indeed, the acceptance of the three $900 forged notes by appellant indicates that Boquet was authorized to sell for less than $3,000. All that Boquet ever said to respondents as to the limit of his authority was that he did not have authority to take $1,000, informing them the next day he did have such authority. It is true the appellant testified the horse was worth $3,000; but the jury were not required to believe it was worth that sum, especially in view of other testimony as to its earning power. So we do not think that these circumstances were so extraordinary as to enable us to say, as

a matter of law, they showed want of authority on the part of Boquet to agree upon a sale at $1,000.

We will now notice Boquet's apparent authority to receive notes in payment, payable to himself. We have seen that Boquet was clearly authorized to sell the horse on time and take payment in notes. We have no evidence of any special instructions as to the form in which the notes were to be made. In view of the conceded power of sale in Boquet as agent, and his exclusive possession of the horse for that express purpose, it would seem clear that respondents would have the right to regard him as also having authority to sell for cash and collect the purchase price. Mechem, Agency, § 388; 1 Clark & Skyles, Agency, § 239; 2 Enc. L. & P. 1003; 31 Cyc. 1358. We then conclude that the jury were fully warranted in believing that Boquet, so far as the rights of respondents are concerned, had authority to sell the horse and receive either cash or notes in payment.

Many authorities have been cited to the effect that power in an agent to sell does not give power to barter or exchange, or take notes in payment payable to the agent. We will notice two of these which are most favorable to plaintiff's contention. In the case of *Hoffman v. Hancock Life Ins. Co.*, 92 U. S. 161, cited by appellant, a note was taken by an insurance agent payable to himself, with other property, in payment of premiums, when he had no authority to receive anything but cash. It was held that such action on his part was without real or apparent authority, and the company was not bound thereby. That case we think differs from this in that the insurance agent had no power to accept anything but cash, while in this case the jury might believe from the evidence Boquet had power to accept either *notes* or *cash*. Counsel also cite *Baldwin v. Tucker*, 112 Ky. 282, 65 S. W. 841, 57 L. R. A. 451. That case is apparently much like this and, were we inclined to follow it, would serve as authority here. The decision, however, was rendered by a divided court, decided by four justices as against three dissenting. It

involved the taking of a note in payment of a piano by an agent, payable to himself, and not thereafter accounted for to his principal. The piano appears to have been in possession of the agent for the purpose of sale at the time of the sale and delivery by him. The question was as to whether or not the act of the agent in taking the note, payable to himself, was sufficient to warrant the court in taking the case from the jury and deciding as a matter of law that the agent exceeded his apparent authority. The majority held that it was. We are impressed, however, with the remarks of Justice Hobson, in his dissenting opinion, concurred in by two of his brethren, as follows:

"No authority can be found for the proposition, so far as I am aware, that the taking of a note by an agent in his own name is, as a matter of law, conclusive to the purchaser that the agent is exceeding his authority. . . . As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority, and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority, and there is nothing in the transaction to put the purchaser on notice that he is exceeding his authority. Where authority is conferred by parol the rule is that the apparent scope of it is a question for the jury. It seems to me the same rule should be applied where the agent is sent to take charge of his principal's interest in a territory distant from his principal, and the secret arrangements between the principal and the agent are unknown to the public dealing with him."

Like the learned dissenting justice in that case we have had no authority called to our attention to the effect that the mere taking of a note by a sales agent, payable to himself, in payment upon a sale made by him of property in his exclusive possession for the purpose of sale and delivery, authorizes the taking from the jury the question of the agent's apparent authority in so doing. The case of *Scleicher v. Armstrong*, (Tex. Civ. App.), 32 S. W. 327, supports this view, though

the question does not seem to have been elaborately discussed. It may be conceded that where an agent has authority to sell for cash only, he cannot take payment in notes payable in the future, either to himself or the principal, and it may be also conceded that where the agent has authority to sell upon credit only, he is not authorized to take such credit except in the name of his principal. We mean such authority as a purchaser is bound to notice. This case presents a different situation, since the jury would be fully warranted in believing that Boquet had authority to take either notes or cash in payment, as we have seen. The only sound reason that can be assigned for prohibiting the giving of notes payable to Boquet for this horse, is that by so doing it placed within his power the ability to convert such notes to his own use and defraud his principal. This reason might apply if Boquet was, at the time of the sale, without authority to sell for cash; but since the evidence was such that the jury might believe he had the authority to receive cash as well as notes in payment, it at once becomes plain that respondents, by giving notes payable to Boquet, were not thereby placing it in his power to defraud his principal any more than as if they had paid him in money.

In view of the power of sale vested in Boquet; the fact that he had exclusive possession of the horse for that express purpose; the fact that the transaction occurred a hundred miles or more distant from the residence of the owner, the owner not being present at any time during the whole six or eight weeks his agent was attempting to make the sale; the fact that respondents and appellant were entire strangers to each other; the fact that Boquet had also in his possession certificates of registration showing the pedigree of the horse, ready for delivery with the horse to whomsoever he might sell, leads us to the conclusion that the jury were warranted in believing from all the circumstances that Boquet was acting within his apparent authority, as respondents had a right to view it.

We are of the opinion that the evidence was not such as to enable the court to dispose of the question of Boquet's apparent authority as a matter of law, and that the cause was properly left to the jury. The judgment is affirmed.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8480. Department One. April 4, 1910.]

ALBERT MAGNUSON, *Respondent*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Defendant*, C. J. JOHNSON, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—APPLIANCES—EVIDENCE—SUFFICIENCY. In an action for injuries to an employee engaged in loading a blast, negligence of the master in failing to furnish a suitable wooden rod to tamp the charge is not shown by evidence that such a rod was provided but broke, and that the employees then used an iron drill which caused an explosion, without calling upon the master for another suitable appliance.

SAME—FELLOW SERVANTS—ASSISTANCE IN LOADING BLAST. Where plaintiff's foreman in charge of drilling two blasting holes about fifteen feet apart, desiring to load both holes at one time, called in a new man, by reason of his experience, to assist the plaintiff in loading one hole while the foreman and others loaded the other hole, the new man and the plaintiff are fellow servants, the former giving no orders or requests that might not be given by fellow servants; and the plaintiff assumes the risks of the other's negligence in using an iron drill in the process of loading.

SAME—VICE PRINCIPALS—ACTS OF FOREMAN. The consent of a foreman to the use of an iron drill in the process of loading a blast does not render the master liable for negligent use of the drill, where the plaintiff's fellow servant was instructed as to the proper use of the drill, but made a mistake of judgment in using it.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the premature explosion of a blast. Reversed.

[1]Reported in 107 Pac. 1043.

Graves & Murphy, for appellant.

Martin J. Lund and *Vince H. Faben*, for respondent.

FULLERTON, J.—Albert Magnuson, as plaintiff, brought this action against the Chicago, Milwaukee & St. Paul Railway Company and C. J. Johnson to recover damages in the sum of $30,000 for personal injuries received by him from the premature explosion of a blast while he was engaged as a laborer on the work of construction of the road of the defendant railway company. On the trial, at the conclusion of the plaintiff's evidence in chief, the case was nonsuited as to the defendant railway company and continued as to the defendant Johnson alone, resulting finally in a verdict and judgment against him in the sum of $13,750.

There is no serious dispute over the principal facts governing the case. The railway company was engaged in constructing its road through the state of Washington. The appellant, Johnson, was building the road as an independent contractor, from the west portal of the tunnel in the Cascade mountains eastward to the city of Ellensburg. He had in his employ a number of men divided into a number of camps working at different places along the route. The appellant had a superintendent of construction who had general charge of all the work. Each of the several camps was in charge of a foreman subject to the direction of the superintendent of construction. At camp 5, one Matt Johnson was foreman. The respondent was employed by the appellant in the early part of March, 1908, to work on the road, as the respondent says, as a common laborer. He was taken to camp 5 and put to work under Matt Johnson in a rock cut as a member of the drilling crew, the duties of this crew being to drill blast holes in the rock.

Just prior to the end of the month of March, the crew had sunk two holes in the rock some twenty or twenty-five feet deep, and had sprung them preparatory to charging them with dynamite. The work of charging the holes was under

the immediate supervision of Matt Johnson, and was begun in the morning of March 31. It appears that, prior to that time, a mucking crew had been working in and near this cut in the nighttime under the direction of one Chris Anderson. This shift had been discontinued and Anderson was brought by Johnson to assist in loading the holes, his desire being, as he expressed it to respondent, to load them both at the same time. The work was begun with Johnson and one of the drilling crew at one hole, and Chris Anderson and the respondent at the other. After the work had progressed for some two hours, the hole at which Johnson had been working became clogged so that he was no longer able to push the dynamite down to the bottom of the hole, and he called for the churn drill to remove the obstruction. This drill was like an ordinary drill formed from a steel bar, except that it was some twenty or more feet in length and was operated after the manner of a plunging churn dasher instead of being struck on the end by a hammer. After the drill was brought to the hole, the bit end was inserted therein and, with the assistance of the respondent, the drill was churned until the obstruction was removed. Shortly thereafter Anderson called for the churn drill, which was brought to him by the respondent. This he took and lowered into the drill hole, when an explosion immediately followed, causing the injury for which the respondent sues.

The witnesses do not agree as to the purpose for which Anderson required the churn drill. One of the allegations of negligence in the complaint was that the master had failed to furnish suitable appliances for tamping the dynamite while loading; namely, a wooden rod. The respondent, while testifying in his own behalf, says that the wooden rod that had been furnished broke during the process of loading, and it was then that Anderson called for the churn drill, leaving the inference, although he does not directly so testify, that Anderson procured the drill to use in place of the broken rod. His witness Stensen, however, says that the hole

at which Anderson was working choked shortly after they had cleaned the other one, and that Anderson called for the churn drill to remove the obstruction. The witness in fact quotes a conversation between Anderson and Johnson, in which Anderson stated to Johnson that the hole at which he was working was so clogged that he would have to use the churn drill, and that Johnson answered by telling him to take it and use it if he thought it necessary. Stensen's statement is corroborated by Johnson, although he gives the conversation between himself and Anderson somewhat more at length than does Stensen, saying that, when Anderson told him of the obstruction, and that it would be necessary to use the churn drill to remove it, he cautioned him to be careful and swab and wash the dynamite away from the obstructions before he attempted to do so.

The witnesses disagree upon another matter also. Both the respondent and Stensen testify that it was dynamite itself that clogged the drill holes, and that it was removed by churning upon it directly with the churn drill. Matt Johnson gave an entirely different version of the transaction. He testified that shots fired to spring the bottom of a hole frequently cause the walls forming its sides to shatter, especially in seamy or shale rock; that in loading the hole, which is done by pushing the dynamite down into the hole with a wooden rod, pieces of rock would fall or be pushed from the side of the wall into the hole, and when these are large enough to lodge before reaching the bottom, will block the hole so tight that they cannot be removed by the wooden rod, but must be cut out with the churn drill; that it was on such an obstruction he used the drill upon the hole that he was loading, and that it was this character of obstruction that was in the hole at which Anderson and the respondent were at work, and not dynamite as stated by the plaintiff's witnesses. He testified, moreover, that it would be extremely dangerous to use a churn drill to remove a clog in the hole caused by the accumulation of dynamite itself, as it would be almost certain to

cause an explosion. Johnson is supported in his statement by an admission made by the plaintiff's witness Stensen. While Stensen did, as we have stated, testify on his examination in chief that the churn drill was used to remove a clog caused by the accumulation of dynamite, in his cross-examination he admits that he had stated to the appellant's representative, prior to the trial, that any one that would use a drill for such a purpose "would be a crazy man." The superintendent testified, moreover, and in this he is not contradicted, that he had expressly cautioned the men loading the holes not to tamp the dynamite with the steel drill.

The obstruction at which the explosion occurred was about six feet down from the top of the hole. The explosion was of sufficient force to seriously injure both Anderson and the respondent, although Stensen and Johnson, who were only fifteen or twenty feet away, escaped injury. Loading had been going on at that time for some two hours, and Johnson estimates that some seventy-five pounds of dynamite had been put into the spring or pocket at the bottom of the hole. This did not explode by the blast, but was exploded by Johnson some time later.

The respondent, in his complaint, charges the appellant with two principal acts of negligence, the first of which is that the appellant negligently failed to furnish him with a suitable appliance with which to load the powder; namely, a wooden rod, and in directing the use of a steel drill for that purpose. But it seems to us that there is absolutely no evidence to establish these allegations. A wooden rod was furnished by the master for the purpose of loading, according to the respondent's own statement, and so far from proving that they were directed to use the steel drill in loading the holes, the only positive evidence in the record is directly to the contrary. True, the respondent testifies that the rod furnished by the master broke before the work was finished and that the drill was used to complete the work. But if this

be true it does not convict the master of negligence. When the appliance furnished by the master gave way, it was the servant's duty to call upon the master for another suitable appliance, and cease work until it was furnished. He could not substitute one that he deemed appropriate, and then hold the master liable for his mistake of judgment. There being, therefore, an utter absence of evidence showing, or tending to show, that the master had failed to furnish suitable appliances for the work, the court should not have submitted the question to the jury. *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428.

The other allegation of negligence is that the "defendant negligently and carelessly directed the foreman in charge of the loading of the dynamite to tamp the same with a steel rod," thereby causing the same to explode, whereby the respondent was injured, etc. The respondent does not contend that the appellant himself actually directed the use of the churn drill in the hole at which he was injured, nor does he contend that the general superintendent so directed it, but contends that Anderson was the foreman in charge of the loading at this particular hole and that his acts are consequently the acts of the master. But we can find no evidence in the record that supports this contention. The respondent does say that Anderson was a foreman, and he calls him such throughout his testimony, but he testifies to no fact that supports this assumption. He admits that Anderson came onto the particular work for the first time on the morning of the accident. That he gave no command or made no request that might not have been properly given or made by one fellow servant of another. He admits that Matt Johnson had been his foreman prior to that morning, and that it was Johnson who directed the digging of the holes and fixed the time for their loading. Moreover, it is testified by every one in a position to know that Anderson was called in to assist in loading the holes because of his experience. This, instead of making him a foreman, would

make him a fellow servant of the others engaged in the same work. Indeed, it would seem that Anderson, in case he should sue for his injuries, could with the same propriety that the respondent now asserts that he (Anderson) was a foreman in charge of the work, assert that the respondent was such foreman. We think, therefore, that Anderson was a fellow servant of the respondent, and that if his act of using the churn drill in the process of loading was negligence, it was negligence for which the appellant is not liable to the respondent.

The case of *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916, is not in point here. In that case the injured plaintiff was not a fellow workman of the persons doing the blasting. He was engaged in another capacity at another place where he could not observe what was going on, or protect himself in any way. It was not so with the respondent in this instance. Here he not only knew what was going on, but was engaged in the very work that caused his injury. The respondent's case falls rather within the principle of the case of *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405, than on the case of *Ongaro v. Twohy*.

But the respondent argues that Matt Johnson admittedly was foreman of this work, and that he bound the master to answer for the injuries the respondent received when he consented to the use of the drill when request was made for it by Anderson. But this fact alone would not bind the appellant to answer for the injury. Conceding that his consent would under any circumstances bind his principal, it could only be so where his consent was given with full knowledge of the circumstances under which the drill was to be used. No such fact appears here. Anderson was told not to use the drill on the obstruction until he had washed and swabbed the dynamite away from it. If Anderson failed in this respect, it was still his mistake of judgment and not that of Johnson.

We conclude, therefore, that there is no substantial evidence on which the judgment appealed from can be sustained,

and the order will be that the judgment be reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 7306. *En Banc.* April 4, 1910.]

WILL A. CHILDS, *Appellant*, v. MINNIE GOOD SMITH *et al.*, *Respondents*.[1]

TAXATION—RIGHTS OF MORTGAGEE—REMEDIES—LIMITATIONS—EQUITABLE LIEN. Rem. & Bal. Code, § 9234, prescribing a remedy for the collection of taxes paid by a mortgagee for the purpose of protecting his lien was not intended as an exclusive remedy; and his equitable right of subrogation does not expire with the lien of his mortgage, the statute providing that the lien for taxes shall continue until the taxes are paid.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered November 12, 1907, in favor of the defendants, upon an agreed statement of facts, dismissing an action for the foreclosure of a mortgage. Reversed.

John L. Wiley, for appellant.

Merritt, Oswald & Merritt, for respondents.

ON REHEARING.

MOUNT, J.—The original opinion in this case may be found in 51 Wash. 457, 99 Pac. 304, where the facts are stated. After that opinion was filed, the respondents' petition for a rehearing was granted, and the case was again heard by the court *en banc*.

It is insisted by the respondents that, inasmuch as the statute, at § 9234, Rem. & Bal. Code, prescribes a remedy for the collection of taxes paid by a mortgagee upon lands, such remedy is exclusive, and the lien for taxes fails with the lien

[1]Reported in 107 Pac. 1053.

of the mortgage. This statute was not intended to fix an exclusive remedy in such cases. It merely declared a rule which was commonly recognized by courts of equity and expressed in mortgages, by which the lienor might protect his lien by the payment of taxes which became a prior lien, and upon foreclosure of the mortgage include therein the payment of such taxes at the same rate of interest as specified in the mortgage. We think the legislature did not intend by this statute to make this remedy exclusive, or to limit the lien for taxes paid in such cases to the time when the lien of the mortgage ceases. There are, no doubt, authorities to the effect that, where a mortgagee pays taxes to protect his lien, his right to collect such payments expires with his mortgage lien. But this court has adopted the rule that the lien for taxes continues until the taxes are paid; (Rem. & Bal. Code, § 9235; *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751), and where one in good faith in the belief that he has a valid lien pays taxes, he is entitled to be subrogated to the rights of the county to the extent of the taxes paid, with interest thereon at the legal rate. *Dunsmuir v. Port Angeles Gas, W., El. L. & P. Co.*, 30 Wash. 586, 71 Pac. 9. In *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846, the repayment of such taxes was adjudged upon equitable grounds without regard to the statute. We there said, at page 535:

"It follows that, if appellant is entitled to relief on account of the taxes paid, it must be based upon equitable grounds, considered with reference to the relations of the parties to the subject-matter. It must be conceded that appellant paid the taxes in good faith, relying upon what he believed to be his lien as authority for it. It cannot be assumed that the payment was made as that of a mere volunteer, or that he only meddled with something in which he knew he had no interest. The evidence shows that the payment was made in the honest belief that appellant held a valid lien upon the land, and he was only seeking to prevent the paramount lien of the taxes from destroying the value

of what he believed to be his own lien against the lands."

and again, on page 538:

"Thus, it is the tendency of courts to see that those who have in good faith advanced the money to pay public taxes are protected. This is equitable and just. No one is injured thereby. The tax lien is paramount, and the payment of the taxes inures to the benefit of both the owner and lien holder. So in this case, the taxes paid by appellant inured to the benefit of respondent as mortgagee. It would be unconscionable that respondent should reap the benefit of such payment without making any compensation therefor."

In numerous cases since *Packwood v. Briggs* we have held that, where a party in good faith pays taxes in order to protect a lien claimed by him, the lien of such taxes is prior to other liens, and the party paying has been adjudged to recover the amount thereof whether he maintained his claim of lien or not. Several of such cases are cited in the original opinion. The case of *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 940, was an action to foreclose a mortgage. It was there held that the right to foreclose the mortgage was barred by the statute of limitations. But it was also held that the plaintiff had a lien for, and should recover, the taxes paid by him upon the property, from the date of the mortgage, which was about ten years.

It will thus be seen that this court, by these decisions, is bound to the equitable doctrine of subrogation in such cases. And this rule is just, for taxes are a lien until paid, and, if not paid by the lien claimant, must be paid to the state by the owner of the land, with interest at the rate of fifteen per cent per annum. Such liens are not like liens which may be barred by time, or where the statute may be tolled to the prejudice of the owner of the land. It is said that, under this rule, no man may safely rely upon the record title of real estate, because someone not the owner may have paid the taxes, and therefore have a lien upon the land without a record of such lien. No such question arises in this case, and, we apprehend, could not be successfully maintained in case of an inno-

cent purchaser for value. If the taxes had not been paid by the lien claimants in this case, the land would no doubt have been lost to respondents long ago by delinquent tax foreclosure.

The conclusion reached in the original opinion is a just one, and we are satisfied with the rules there stated.

RUDKIN, C. J., GOSE, CHADWICK, FULLERTON, and CROW, JJ., concur.

DUNBAR, J., took no part.

[No. 8400. *En Banc.* April 8, 1910.]

ERNEST OLSON, *a Minor, by his Guardian etc., Respondent,* v. GILL HOME INVESTMENT COMPANY *et al.*, *Appellants.*[1]

EXPLOSIVES — NEGLIGENCE — DANGEROUS PREMISES — TRESPASSING CHILDREN—EVIDENCE—SUFFICIENCY. It is negligence for defendant, in violation of a city ordinance, to needlessly store exposed dynamite, fuse, and caps, not intended for immediate use, upon a shelf in an unlocked toilet on premises frequented by trespassing children, where it was apt to be found and taken, and the defendant is liable for injuries sustained by a boy thirteen years of age, who took the same and was injured in attempting to cause an explosion, the defendant owing in such case the highest degree of care as to trespassing children.

SAME—PROXIMATE CAUSE—INTERVENING ACTS—QUESTION FOR JURY. In such a case, the negligent act of storing the explosives is the proximate cause of the accident, notwithstanding the criminal act of the boys in stealing the dynamite, fuse, and caps, it being for the jury to determine whether the defendant should have anticipated the result.

SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. A boy thirteen years of age who steals dynamite, fuse, and caps, and knows of its explosive qualities, is not, as a matter of law, guilty of contributory negligence precluding a recovery for injuries received, where he caused an explosion in attempting to pry out the cap with a stick, after unsuccessful attempts to fire the cap.

[1]Reported in 108 Pac. 140.

New Trial—Newly Discovered Evidence. A new trial for newly discovered evidence is properly refused where the new evidence merely affected the credibility and weight of the evidence of witnesses who had given conflicting evidence upon a former trial of the action, such previous testimony having been shown on the last trial.

Damages—Personal Injuries—Excessive Verdict. A verdict for $25,000 for the loss of both hands by a boy thirteen years of age is not excessive.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 30, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor through an explosion of dynamite. Affirmed.

Leander T. Turner, *Ellis, Fletcher & Evans*, and *Sandford C. Rose*, for appellants.

H. M. Owens and *Bates, Peer & Peterson*, for respondent.

Crow, J.—This action was commenced by Ernest Olson, a minor, by M. E. Olson, his guardian *ad litem*, against Gill Home Investment Company, a corporation, and Clark N. Gill, its president and manager, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendants have appealed.

The appellant Gill Home Investment Company was engaged in selling an addition to the city of Tacoma, and was itself owner of four unfenced lots therein, located at the intersection of two public streets. A small building constructed for toilet purposes was located on these lots, about one hundred and twenty-five feet from one street and thirty-nine feet from the other. A board screen or wall, about six feet high, was in front of the unlocked toilet door. Between the toilet and the nearest street was a small tool house. Some weeks prior to the accident which caused respondent's injuries, the appellant corporation commenced the construction of a cement building, and Clark N. Gill, its president and manager, caused a box and several loose sticks of Her-

cules stumping powder (hereinafter called dynamite, a term used by the witnesses), to be removed from the tool house and stored on a shelf in the toilet, doing so to protect workmen who went into the tool house. The shelf was located on plates upon which the rafters rested, about six feet eight inches above the floor and five feet eight inches above the seat of the toilet. The toilet door was left unlocked. A pile of sand, attractive to children but designed for use in mixing concrete, was kept on appellants' lots near the toilet. A public school was about three blocks distant. Several residences, the homes of children, were located in the vicinity. A number of young school boys, including the respondent, were in the habit of playing upon appellants' lots. They occasionally visited and used the toilet, as did other persons, most of whom were appellants' employees. One of the boys, Wesley Depew, nearly fourteen years of age, discovered the box and loose sticks of dynamite and told his twin brother Leslie Depew of such discovery. On a Sunday prior to the accident, Leslie Depew, with two younger boys, went to the toilet and took a loose stick of dynamite which they hid under a stump. Wesley Depew had previously taken some dynamite caps and fuses which he says he found in the toilet. He exploded one of these caps and gave some of them to the respondent, who was then about thirteen years of age. On the day of the accident, Leslie Depew and two other boys, accompanied by respondent, took the dynamite, caps and fuse, to some vacant ground one-fourth of a mile distant, where respondent attached a cap and fuse to the stick of dynamite, and igniting it, unsuccessfully tried to explode it under a large stump. He then attempted to explode it with a lighted paper, but again failing, undertook to remove the cap by prying it from the dynamite with a stick. This produced an unexpected explosion which caused respondent to lose both of his hands.

Appellants have filed admirable briefs, in which numerous assignments of error, involving many interesting points, are

presented; but their controlling proposition is that the trial court erred in refusing to instruct the jury to return a verdict in their favor. They, in substance, contend, (1) that the respondent and other boys were trespassers, to whom they owed no other duty than not to wilfully or maliciously injure them; (2) that if appellants were in fact negligent (which they deny), their negligence was not the proximate cause of the accident; (3) that intervening between the storage of the dynamite and the injury were the criminal acts of the boys in stealing the dynamite, caps and fuse, which acts were the proximate cause of the accident; and (4) that the respondent was guilty of contributory negligence as a matter of law.

The respondent contends that the sand made the place attractive to the boys; that they had been in the habit of frequently playing there, a fact well known to appellants; that appellants were guilty of negligence in leaving the loose dynamite in the unlocked toilet where it was apt to be found and taken by the boys; and that such negligence was the proximate cause of the accident.

To sustain appellants' contention that the boys were trespassers, Clark N. Gill and two or three employees of the corporation testified that they had driven them away on several occasions. It is manifest that the boys repeatedly went upon the lots to the appellants' knowledge. This being true, we think the evidence is sufficient to show that the appellants were guilty of the grossest and most culpable negligence in storing the dynamite as they did, concededly in violation of a city ordinance, and in leaving a door unlocked in a locality where, as they knew, the boys frequently went, whether as trespassers or otherwise. They knew the dynamite was a dangerous agency. There is no evidence that they were then using it, or that they intended to use it in the immediate future, or that they would need it at any time. The evidence rather indicates that the dynamite was unlawfully stored and left for an indefinite time in an unlocked, vacant structure

where the appellants must have known the children were liable to be, either as trespassers or otherwise. In support of their contention that they are not liable to respondent, whom they claim to have been a trespasser, the appellants cite *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Burnett v. Fort Worth Light & Power Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504; *Masser v. Chicago R. I. & P. R. Co.*, 68 Iowa 602, 27 N. W. 776; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Le Duc v. New York Cent. H. R. Co.*, 92 App. Div. 107, 87 N. Y. Supp. 364; *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903; *Felton v. Aubrey*, 74 Fed. 350. None of these cases are similar to the one at bar. In each of them the defendant was charged with negligence in operating, constructing, or maintaining certain appliances, machinery, or plants used in and necessary to the conduct of his or its business. In the *Curtis* case the plaintiff, a child, was injured by machinery which constituted a part of the defendant's plant. In the *Burnett* case the plaintiff, a boy, went upon a roof where he was electrocuted by a wire which, although negligently exposed without being insulated, was nevertheless a part of the defendant's plant. In the *Masser* and *Le Duc* cases the children trespassed upon railways. The other cases are similar in principle. It was necessary in each instance for the defendant to have and operate the appliance which caused injury to the trespassing boys. The defendants, even had they known of the trespassing, could not have entirely refrained from installing and operating their several plants or appliances and at the same time continue their business. In the *Curtis* case this court said:

"To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights. We are satisfied, therefore, that the respondent violated no duty it owed to the appellant as a trespasser upon its premises."

Here the appellants, having no apparent use for the dynamite and knowing of the trespassing proclivities of the boys, needlessly stored it, a most dangerous agency, where, in the exercise of ordinary prudence, they should have anticipated the trespassing boys would readily find, be attracted by, and take it. Under such circumstances we cannot hold that the trespassing of the boys should, as a matter of law, excuse the appellants from liability. The degree of care required of those who have control of dangerous explosives is discussed in *Mattson v. Minnesota & N. W. R. Co.*, 95 Minn. 477, 104 N. W. 443, 111 Am. St. 483, 70 L. R. A. 503, the court saying:

"The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (Keasbey, Electric Wires, 2d ed., 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. *Railway Co. v. Stout*, 17 Wall. 657. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child. 7 Am. & Eng. Ency. Law (2d ed.) 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called 'turntable cases.' There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of the defendant. It

failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves."

The strongest case cited in favor of appellants' contention is *Finkbeiner v. Solomon*, 225 Pa. 333, 74 Atl. 170, in which a child was injured by an explosive claimed to have been negligently stored; but the court said:

"The facts of the case bring it close to the line of what might be deemed negligence, but we cannot say that the view taken by the court below was wrong. It cannot be said that placing a box of such caps upon a dark shelf in a barn is in itself a negligent act. If defendant had thrown the caps out, loosely, where children were likely to play, and would be apt to find them, the case would have been very different."

Although appellants did not loosely throw out the dynamite, caps and fuse, they might as well have done so as to have placed them where the boys were apt to, and did, readily find them, a result appellants should have anticipated. We do not think the decision cited is so controlling in principle as to require a withdrawal of this case from the jury.

Appellants, citing many authorities, further contend that their negligence, if conceded, was not the proximate cause of the accident, but that the intervening criminal act of the boys in stealing the dynamite, caps and fuse, and their subsequent acts in attempting to explode the same, were the proximate cause. In an action for damages resulting from negligence, the defendant will be held liable for the natural and probable consequences of his negligent acts. To create such a liability the injury complained of must result from the negligence charged, which will not be considered as too remote if the resulting accident might have been reasonably anticipated. The act of an intervening third party, contributing to the injurious result of the original negligence, does not, in all cases, excuse the original wrongdoer. If such intervening act could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate

cause of the injury. In this case it was for the jury to determine whether the appellants who carelessly and illegally stored, and it might be said abandoned, a dangerous explosive, should have anticipated that it might come into the possession of young boys who frequented the place, even though they were trespassers.

"In addition to the requirement that the result should be the natural and probable consequence of the negligence it is commonly stated that the consequence should be one which in the light of attending circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence." 29 Cyc. 493.

See, also, *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902, 60 L. R. A. 793; *Akin v. Bradley Engineering & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Wellington v. Pelletier*, 173 Fed. 908; *Mattson v. Minnesota etc. R. Co., supra; Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Scott v. Shepherd*, 2 W. Bl. 892; *Englehart v. Farrant & Co.*, 1 Q. B. (1897) 240; *Myers v. Sault St. Marie Pulp & Paper Co.*, 3 Ont. L. R. 600; *Labombarde v. Chatham Gas Co.*, 10 Ont. L. R. 446; *Clark v. Chambers*, 3 Q. B. (1878) 327, 7 Cent. Law Journal 11; *Lynch v. Nurden*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 C. & P. 190; *Lake v. Millikin*, 62 Me. 240, 16 Am. Rep. 456; *Harriman v. Pittsburgh etc. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; *Lane v. Atlantic Works*, 111 Mass. 136; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. 659; *Fishburn v. Burlington & N. W. R. Co.*, 127 Iowa 483, 103 N. W. 481.

No two cases can be found which are identical, and there is an irreconcilable conflict of authority on this question, but we think the above mentioned cases, and many others that might be cited, announce correct principles of law applicable to the facts now before us. In *Myers v. Sault St. Marie Pulp & Paper Co., supra*, a workman employed by the de-

fendants ascended a movable stepladder to work near the unguarded rim of a cogwheel. When he was about to descend, a truckman moved the ladder, causing him to fall on the unguarded wheel. The contention was made that the defendants' negligence in failing to guard the cogwheel as required by statute, and in failing to provide an immovable ladder, was not the proximate cause of the accident, but that the wrongful act of the truckman in moving the ladder was such proximate cause. The issue was submitted to the jury, and the appellate court, speaking through Armour, C. J. O., said:

"The jury having found that the injury to the workman was caused by the negligence of the defendants in no way guarding the wheel, and in not properly fastening the ladder to the floor, and this finding being, as I think, supported by the evidence, the next question is, did the intervention of the workman in wrongfully taking away the ladder relieve the defendants from the consequences of their negligence, and I think not, for the defendant's negligence still remained an operating cause of the workman's injury. According to what is said by Lord Esher and Rigby, L. J., in *Engelhart v. Farrant & Co.* [1897], 1 Q. B. 240, the question whether the negligence of the defendants was an effective cause of the workman's injury was a question for the jury, and if so, they have in effect determined it, by finding, as they did in their answers to the third and seventh questions submitted to them. And I think that the authorities show that the intervention of the workman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence."

In *Labombarde v. Chatham Gas Co.*, *supra*, where plaintiff received an electric shock, the court said:

"But if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground to render those guilty of the latter negligence liable

for the consequences which ensued though an independent agency had intervened as their immediate cause. The original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs. *McDowall v. Great Western R. W. Co.* [1902], 1 K. B. 618 [1903], 2 K. B. 331, 337-8."

The recent case of *Wellington v. Pelletier, supra*, is especially pertinent. There the defendant's employees had negligently left a number of cars standing on a spur track at the head of a grade, secured only by setting the brakes. They should have been further secured by fastening or blocking the wheels. Some children playing about the cars released the brakes, causing them to run down and kill defendant's employee, who was working in a trench between the rails of the spur. It was held that the intervening act of the children did not prevent the defendant's negligence from being the proximate cause of the accident. The court said:

"It is claimed that the interposition of the boys in this case was the interposition of a new efficient cause, which, if interposed, the law says eliminates the original cause. On the other hand, it has been thoroughly understood, since the leading case of *Scott v. Shepherd*, 2 W. Bl. 892, well known as the 'Squib Case,' that the interposition even of human beings, acting under circumstances which deprive them of periods for reflection, or known to be of classes which are ordinarily governed by unreasoning impulses, does not come within the class of responsible interventions referred to. This is illustrated in one direction by the squib case, and in the other direction by the well known cases where young children, either through carelessness or inattention, have been intrusted with dangerous weapons. The general principle is sufficiently discussed in Pollock's Law of Torts (8th Eng. ed.) 45 *et seq.* The rule on which the plaintiff relies in this respect was authoritatively stated and applied by the Court of Appeal in 1896 in *Engelhart v. Farrant* [1897] 1 Q. B. 240."

In this case it was for the jury to determine whether respondent and the other boys, considering their age, their experience, and their knowledge of right and wrong, were

in their acts governed by unreasoning and natural impulses. That the question of proximate cause was properly submitted to the jury, see: *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U. S. 469; *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988; *Denver etc. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261.

Appellants make other assignments of error based upon instructions given and refused, but the foregoing discussion disposes of them adversely to their contention. The instructions given fully, fairly, and correctly stated the law, and properly submitted all issues of fact to the jury for their consideration.

It is contended that the criminal act of the boys in stealing the dynamite was such an independent, intervening act as to insulate the appellants' negligence and relieve them from liability. The question as to whether the boys fully understood the criminal import of their act was properly submitted to the jury and determined adversely to the appellants' contention, as was also the question of the contributory negligence of the respondent, he being of tender age. There was evidence tending to show that the boys, including respondent, did, to a limited extent, realize that dynamite was a violent explosive. They were trying to explode it; but the evidence further shows that they did not fully understand or appreciate all of its dangerous qualities. They supposed it could only be exploded by some method of ignition, and when they lit the fuse, they dodged behind large stumps for protection. It is evident, however, that they did not anticipate that any explosion could be produced in the manner in which it was produced. In the light of respondent's tender years, his limited knowledge, his lack of experience, and all of the facts and circumstances disclosed by the evidence, we cannot hold that he was, as a matter of law, guilty of such contributory negligence as to relieve the appellants from liability, but must hold that the question of his contributory negligence was an issue for the jury.

It appears that, on a previous trial, the boys Wesley and Leslie Depew gave evidence tending to show that, when they took the dynamite, caps and fuse, they understood they were guilty of the act of stealing. On the last trial their evidence tended to show that they did not understand their acts to be criminal, but supposed they were taking abandoned property, and at the time thought nothing about any criminal act or wrong being involved. After the trial certain affidavits were procured from the boys, tending to show that they did understand the criminal nature of the acts involved, and upon these affidavits as newly discovered evidence, the appellants moved for a new trial. They now contend that the trial judge erred in denying their motion. Upon the last trial they were permitted to, and did, show the previous testimony of these boys, and were a new trial to be now granted, it could again be shown that on different occasions there had been some conflict in the boys' testimony. Even then, their credibility and the weight of their evidence would still be a question for the jury. We fail to see that the trial judge abused his discretion or invaded any of appellants' rights in denying the motion for a new trial.

The jury awarded damages in the sum of $25,000, for which judgment was entered. Appellants now contend the award is excessive. While the verdict is large, the respondent sustained most terrible injuries. We do not think we would be justified in ordering any reduction. The judgment is affirmed.

Rudkin, C. J., Dunbar, Parker, Mount, Fullerton, and Gose, JJ., concur.

[No. 8269. Department Two. April 22, 1910.]

J. V. EICHBAUM, *Respondent*, v. CALDWELL BROTHERS COMPANY, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. On trial *de novo* after a trial before the court without a jury, error in admitting incompetent evidence is immaterial where the findings are sustained by competent evidence.

SALES—ACTION FOR PRICE—WARRANTY—BREACH—EVIDENCE—COMPETENCY. In an action for the price of a pump of a certain capacity and guaranteed weight, evidence that the parties did not know the weight of a pump of that capacity is admissible as bearing upon the question whether the weight was necessary to insure the capacity, a lighter weight having been accepted and damages claimed by the defendant.

SAME—DAMAGES FOR BREACH OF WARRANTY—WAIVER. The purchaser of a pump of a certain capacity and of "guaranteed weight 35,000 lbs." cannot recover damages because the pump delivered weighed only 27,000 lbs., if the lighter pump actually performed every function of a pump of the heavier weight and was equally serviceable, durable, and valuable, as the guarantee is waived by receiving the lighter pump.

SAME—DELAY IN DELIVERY—LOSSES NOT CONTEMPLATED. In an action for the price of a pump to be manufactured and shipped within a specified time, the defendant cannot recover loss of rentals during delay in delivery, where there was nothing to show that such damage was within the contemplation of the parties or actually sustained, or that there was any opportunity to rent it if it had been promptly delivered, and it was received before the defendant was ready to use it.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 14, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Shank & Smith, for appellant.

Charles M. Baxter, for respondent.

[1]Reported in 108 Pac. 434.

Crow, J.—This action was commenced by J. V. Eichbaum against Caldwell Brothers Company, a corporation, to recover $3,890 and interest, for a turbine pump sold and delivered to defendant by H. R. Worthington, a corporation, plaintiff's assignor. From a judgment in plaintiff's favor, the defendant has appealed.

The claim was assigned to Eichbaum for collection, he being the agent of H. R. Worthington, the vendor corporation and real party in interest, hereinafter designated as the respondent. The appellant, after alleging that the pump was to weigh 35,000 pounds; that it was to be shipped within eight weeks after August 11, 1906; that respondent failed to make any shipment until December 1, 1906, and that an inferior pump of lighter weight and construction, worth $1,500 less than the one ordered, was then shipped, further alleged:

"That because of the delay of the said Worthington in furnishing any pump at all and his then furnishing only a pump of the sort and value hereinabove set out, the defendant is damaged in the sum of four thousand three hundred dollars ($4,300), which is in excess of the plaintiff's total claim."

The appellant contends, that the trial court erred in admitting evidence to show that it should be estopped from interposing any claim for damages, the respondent having failed to plead an estoppel. Although it appears that the trial court admitted the evidence and regarded it as material, we will not discuss its competency, for assuming, without deciding, that it was incompetent, and eliminating it from our consideration, we have nevertheless concluded that, upon the competent evidence, the judgment must be affirmed. The cause is now before us for trial *de novo*, upon the competent evidence, and we will so consider it, there being no contention that any competent evidence was improperly excluded.

We find that, on Monday, August 13, 1906, the appellant executed the following order:

"The Caldwell Bros. Co., Machinery Merchants.

"Date of order Aug. 13, '06.

"To be shipped. Seattle, Wash.

"Mr. J. V. Eichbaum, Mgr. H. R. Worthington Pump Co., Alaska Bldg., Seattle.

"Gentlemen: Please enter our order for shipment upon above terms. Ship to ourselves at Seattle, Route N. Y. C., Lake Shore, C., M., St. P. & U. P.

"One 4-stage Turbine pump with a capacity of 4,000 gals. per minute, designed for head 430 ft. under conditions as explained to Mr. Eichbaum with brass impellers and shaft;

"Instructions later as to whether this pump will be belt or rope driven.

"Shipment eight weeks from Aug. 11th, 1906.

"Guaranteed weight 85,000 lbs.

"Confirmation of verbal order given you by Mr. Mather.

"The Caldwell Brothers Co.

"GFK—J. By John Mather, General Manager,"

that on the preceding Saturday the probable weight of the pump was discussed with reference to its capacity and with reference to the freight charges; that the respondent had not theretofore manufactured a pump of the capacity contemplated; that not knowing its probable weight, the parties agreed upon 85,000 pounds as guaranteed in the order; that the respondent did not manufacture the pump within the time agreed; that on November 20, 1906, appellant's president called upon the respondent in New York City, and learning that the manufacture of the pump had not yet been commenced, without expressly waiving any rights, then urged the respondent to manufacture and ship it as soon as possible; that respondent did so, making the shipment on December 1, 1906; that it reached Seattle fifty-six days later than it would had it been shipped at the time stipulated; that the appellant received the pump, but was unable to install or use it for several days thereafter, as a necessary concrete foundation had not been prepared to receive it; that before receiving the pump, appellant learned from the bill of lading and other sources of information, that it weighed not more than

27,400 pounds; that in a letter written to respondent on December 31, 1906, appellant complained of the light weight as affecting freight charges, but said, "If the pump will perform the work required of it, good and well"; that the pump, although lighter in weight, did perform the work required of it; that it possessed the power, capacity, and functions contemplated by the written order; that it was not less valuable than a similar pump weighing 35,000 pounds, and that the appellant sustained no damage by reason of delay in shipment.

Although no estoppel was pleaded, the trial court held the appellant was estopped from claiming damages, because it knew the actual weight before receiving the pump, and because it urged the respondent to manufacture and ship the pump after the time for shipment had expired. If the appellant did in fact sustain damages resulting from light weight, it was entitled to receive the pump actually shipped, and when shipped, recoup its losses by pleading its damages in this action. By accepting a pump of lighter weight, it only waived its right to insist upon the delivery of a pump weighing 35,000 pounds as guaranteed, but did not waive its right to any resulting damages which it sustained. In other words, if the pump weighing 27,400 pounds and actually received was less valuable than a similar pump weighing 35,000 pounds, appellant was entitled to recover such difference in value by recoupment in this action. If, however, it was equally valuable, notwithstanding its lighter weight, no damages resulted and no recovery therefor could be sustained.

At the time the order was given, the parties did not know the actual weight of a pump of the capacity desired and ordered. Evidence admitted disclosing such lack of knowledge was competent, not to vary the terms of the written contract, but as bearing upon any information the parties had, at the date of the order, as to whether 35,000 pounds weight was necessary to insure the stipulated capacity and power, appellant having waived the warranty as to weight

by receiving the lighter pump. If the lighter pump actually performed every function required of a pump of the weight ordered, and was equally serviceable, durable, and sound, it was also equally valuable, and no damage resulted. Applying this test, it appears from the evidence that the pump received was as valuable as the one ordered. This being true, the appellant, having received it, cannot now recover damages for its shortage in weight, the warranty as to weight being waived.

Shipment of the pump was delayed for fifty-six days. Appellant offered evidence to show that the fair rental value of the pump was $50 per day, and now claims $2,800 damages for rentals lost. A vendee injured by the breach of a vendor's contract to manufacture, sell, and deliver personal property within a specified time, is entitled to recover damages therefor, including gains prevented as well as losses sustained; but such damages to be recoverable must be actual and certain and must constitute such a loss as might be expected to naturally follow, or directly result from the breach. Mr. Mechem, at § 1757, of his work on Sales, citing *Hadley v. Baxendale*, 9 Exch. 341, and *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, leading cases, says:

"The general rule governing the allowance of damages for breach of contract generally has in view the two conditions referred to in the preceding section. As stated in substance in the famous English case of *Hadley v. Baxendale*, and in the American case of *Griffin v. Colver*, that rule is this: The party who has broken his contract is liable to make compensation to the other for all such losses resulting from that breach as are either—

"(1) The ordinary, the usual, the commonly-to-be-expected consequences of such a breach of such a contract; or

"(2) The peculiar or unusual consequences of the breach of the particular contract in question, if, under the circumstances, it can fairly be said that both parties had those consequences in their contemplation, at the time the contract was made, as a probable result of its breach; and if those unusual consequences are neither uncertain in their nature nor remote as to their cause."

Appellant's claim for rentals comes within the second class, but there is not any competent evidence in the entire record showing, or tending to show, that the respondent was advised of, or had the least intimation of, the disposition or use the appellant intended to make of the pump. *Lowenstein v. Chappell*, 30 Barb. 241; *Landsberger v. Magnetic Telegraph Co.*, 32 Barb. 530. In *Griffin v. Colver*, *supra*, the court said:

"The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

The theory upon which the appellant contends it is entitled to rents is that profits for the use of a pump could not be readily shown, but that the value of the rents could. Rents are therefore demanded as compensation in lieu of profits lost. There is nothing in the record to show that any such damage could have been within the contemplation of the parties when making the contract, or that they were actually sustained. The evidence does show that the pump was received before the appellant was ready to use it, or could use it. It is therefore manifest that appellant sustained no actual loss as a result of delay in shipment. Before it could recover rents as damages, it should in any event have shown an opportunity to actually rent the pump had it been promptly shipped. *Wagner v. Corkhill*, 40 Barb. 175. We are unable to find that the appellant has sustained any damages in the actual value of the pump, or in the delay in shipment.

The judgment is affirmed.

Rudkin, C. J., Parker, Dunbar, and Mount, JJ., concur.

[No. 8371. Department Two. April 28, 1910.]

E. C. MACDONALD, *Trustee et al., Plaintiffs and Respondents*, v. EDWARD O'SHEA, *Administrator etc., Defendant*, THOMAS WALSH *et al., Defendants and Appellants.*[1]

CONTRACTS—SURVIVAL—PARTIES—PERSONAL REPRESENTATIVES. The obligations of a building contract which provides that it shall bind the parties, their heirs, and personal representatives, survives on the death of the contractor and binds his administrator.

INDEMNITY—DEATH OF PRINCIPAL—DEFAULTS OF PERSONAL REPRESENTATIVES. Where the obligations of a building contract survive, the surety on the contractor's indemnity bond is liable for defaults by the administrator after the contractor's death.

INDEMNITY — CLAIMS — EMPLOYMENT OF SUPERINTENDENT—EXECUTORS AND ADMINISTRATORS. Where the character and size of a building rendered the employment of a superintendent necessary after the contractor's death, his administrator may employ a superintendent whose claim would be a charge against the surety on the contractor's indemnity bond.

INDEMNITY—PAYMENT OF LIENABLE CLAIMS—REMEDIES OF INDEMNITOR. The surety on a contractor's indemnity bond, conditioned for the performance of the contract and to protect the property against liens, may, after default, pay lienable claims that were about to be filed, before the time for their filing has expired, and recover therefor on security given by the contractor.

EXECUTORS AND ADMINISTRATORS—CLAIMS—NECESSITY—MORTGAGES—FORECLOSURE—INDEMNITY. It is not a necessity for a surety on a contractor's indemnity bond to file a claim against the contractor's estate, where it merely seeks to foreclose a mortgage given by the contractor as security for the execution of the indemnity bond.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 20, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose an indemnity mortgage. Affirmed.

John M. Gleason (*Joseph F. Morton*, of counsel), for appellants.

E. C. Macdonald and *Donald F. Kizer*, for respondents.

[1]Reported in 108 Pac. 436.

PARKER, J.—This is an action to foreclose an indemnity mortgage. A trial resulted in findings and judgment in favor of the plaintiffs, and certain of the defendants have appealed.

The material facts are, in substance, as follows: The National Surety Company is a corporation authorized to transact the business of surety in this state. On April 27, 1905, John J. Walsh executed and delivered to E. C. Macdonald, as trustee for the National Surety Company, a mortgage upon real property in Spokane, which mortgage by its terms was given to secure the sum of $3,500. This mortgage was intended to indemnify the surety company against any damage or loss which it might incur upon any bond thereafter executed by it at the request or for the benefit of John J. Walsh. On May 25, 1906, at the instance and request of John J. Walsh, the surety company executed and delivered its bond as surety in his behalf in favor of the Standard Furniture House, incorporated, in the sum of $7,500, whereby the surety company guaranteed that he would well and truly perform a certain building contract for the construction of a building, entered into on that day by him with the Standard Furniture House. By the terms of the building contract he was to furnish all material and labor for the erection and completion of the building, according to certain plans and specifications, at an agreed compensation of $15,050.75, and was to protect the property against all claims and liens occurring by reason of the construction of the building. It was provided in the contract that "The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained."

On July 21, 1906, John J. Walsh died. At that time a comparatively small part of the contract had been performed. Soon thereafter Edward O'Shea was appointed and duly qualified as administrator of the estate of John J.

Walsh. The administrator, under the sanction of the court, proceeded with the construction of the building under the contract made by the deceased. Thereafter the administrator defaulted in the performance of the contract, in that he suffered and permitted liens to be filed against the property, and neglected to pay certain bills for material and labor used in its construction, amounting in the aggregate to $3,492.40. These claims were all lienable claims against the property, though not all of the claimants had actually filed liens. Thereupon the Standard Furniture House demanded that the surety company save it harmless from these claims. Thereupon the surety company, after investigating the claims and being satisfied of their validity, and that it was liable as surety upon the bond for their payment, complied with the demand of the Standard Furniture House and paid the claims on February 14, 1907. The appellants are heirs of John J. Walsh, and as such are interested in the mortgaged property. The court concluded that the claims paid by the surety company were valid claims against John J. Walsh and the surety company as surety, upon the contract and bond; and that the surety company, by virtue of its indemnity mortgage, was entitled to have the sums so paid by it declared a lien upon the property described in the mortgage, and to have the mortgage foreclosed.

Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between him and the Standard Furniture House that his obligation under the contract to construct the building did not survive but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims, accruing after the death of Walsh, in the construction of the building. The general rule governing the survival of contractual obligations, as against the personal representative and the estates of deceased persons, is stated in 2 Parson's on Contracts (9th ed.), 685, as follows:

"It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract; as where the thing to be done required the personal skill of the testator himself." See, also, 18 Cyc. 239.

This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. The supreme court of Pennsylvania in *Billings' Appeal*, 106 Pa. St. 558, 560, said:

"Where a party agrees to do that which does not necessarily require him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true, also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of *Dickinson v. Calahan's Administrator*, 7 Harris, 227, to have intended its dissolution at death. The whole question, in each case, is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general."

In the case before us there is no doubt of the intent of the parties to make this building contract binding upon the administrator of John J. Walsh as his personal representative in the event of his death before the completion of the building, since the contract by its express terms so provides.

Therefore the administrator was bound to complete the performance of the contract in so far as the assets of the estate would permit, unless we can say that the building contract imposed upon John J. Walsh such a personal duty as to render it practically impossible of performance by any one but himself. An exhaustive note citing many authorities relating to this subject may be found in 21 L. R. A. (N. S.) 915 (*Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 336). See, also, note in 68 American Decisions, 760 (*Hawkins v. Ball's Adm'r*, 18 B. Monroe 816). It is clear that the obligation of deceased under this building contract was that of an independent contractor and was not a matter of rendering personal service. 16 Am. & Eng. Ency. Law (2d ed.), 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building, or any part thereof, when completed should be the product of his own personal labor or skill, either as laborer, mechanic or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death; while there is eminent authority to the contrary. Judge Woerner in his American Law of Administration (2d ed.), § 328, says:

"If one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a sub-contractor is entitled to his lien for materials furnished the intestate."

See, also, 3 Williams, Executors (7th Am. ed.), 224. Both

of these eminent text writers cite in support of their text, among other authorities, the early English case of *Quick v. Ludborrow*, reported in 3 Bulstrode's Reports, 30, in the year 1659, in which Coke, Chief Justice, said: "If a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this." The following cases relating to building contracts support this view: *Kadish v. Lyon*, 229 Ill. 35, 82 N. E. 194; *Janin v. Browne*, 59 Cal. 37; *Riblet v. Wallis*, 1 Daly 360, 365; *Bambrick v. Webster Groves Presbyterian Church Ass'n*, 53 Mo. App. 225, 238; *Russell v. Buckhout*, 87 Hun 46, 34 N. Y. Supp. 271.

We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person.

One of the claims paid by the surety company was that of one Hutter, who was employed by the administrator to superintend the construction of the building. It is contended the administrator was not authorized to so employ Hutter, but it seems to us that the administrator was as much authorized to employ a superintendent as he was to employ mechanics and laborers. It is not seriously contended that a skilled superintendent was unnecessary. Indeed, the character and size of the building, as indicated by the record, would seem to render it plain that the employment of a skilled superintendent for its construction was reasonably necessary. We think that the surety company was as much bound to save the Standard Furniture House harmless from this claim as from the claims of other employees and materialmen, it being a lienable claim. 20 Am. & Eng. Ency. Law (2d ed.), 342.

We have noticed that liens were not actually filed by all the claimants, and it is argued that the surety company was not warranted in paying claimants who had not actually filed

liens. We think it is clear that all the claims paid by the surety company were lienable claims, and it seems plain from the evidence that, at the time of the payment of them by the surety company, the time for filing such liens had not expired, and that they would have been filed had not the surety company paid them. We think, under the circumstances, it was the duty of the surety company to pay them without waiting for them to be actually filed.

It is contended that the surety company ought not to be allowed to maintain this action because he did not file any claim against the estate with the administrator before commencing the action. If the surety company was seeking to charge the estate generally with its claim, there would be merit in this contention, but since it is seeking only to enforce its lien against the mortgaged property which was expressly pledged to secure its claim, the failure on its part to file a claim with the administrator does not affect its right to foreclose the mortgage. *Scammon v. Ward*, 1 Wash. 179, 23 Pac. 489.

It is contended that the evidence does not support the court's finding as to the amount and validity of the claims paid by the surety company. In this connection some contention is made against the good faith of the administrator, and also against Hutter, the superintendent, it being claimed that the building cost more than it would have cost by proper management in its construction. We have carefully read all of the evidence and conclude it was sufficient to justify the court's findings in the particulars complained of; nor do we find anything in the evidence which would warrant the conclusion that the surety company was in any way responsible for any excessive cost of the building, necessitating its payment of these claims.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8553. Department Two. April 28, 1910.]

WILLIAM W. CATHEY, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

STREET RAILWAYS—COLLISION WITH VEHICLE—NEGLIGENCE—QUESTION FOR JURY. The negligence of a motorman on a street car in failing to avoid a collision with an ice wagon is for the jury, where it appears that the horses became frightened and could not be kept from crowding onto the car track while the street car was a block away, that the motorman could have observed the team, brought his car under control, and avoided the injury, and the driver of the team, an experienced man, did all he could to avoid it.

JURORS—SELECTION—STATUTES—COURTS—COMMON LAW POWERS. Jurors selected in May, 1909, to serve during the next month, under the law in force at the time of their selection, may serve during such June term, although by the act of 1909, taking effect June 8, the former laws were repealed and a new method provided for selecting jurors for each ensuing month, leaving no law in force for the selection of jurors in June, 1909, in view of the constitutional authority of the superior courts and their common law power to provide juries.

NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE. In an action for injuries received by one riding with the driver of an ice wagon, in collision with a street car, it is proper to instruct that the plaintiff may recover notwithstanding negligence on the part of the driver of the team, if the plaintiff did not cause and was not responsible for such negligence, had no control over the driver, and was not guilty of negligence himself.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 13, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained in the collision of an ice wagon and a street car. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Milo A. Root, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from

[1]Reported in 108 Pac. 443.

the negligent operation of one of the street cars of the defendant. The defendant operates a double track electric street railway upon First avenue, in Seattle. First avenue runs approximately north and south. Battery street intersects First avenue at right angles. Bell street also intersects First avenue at right angles one block south of Battery street. The plaintiff was injured by a collision between a street car of the defendant and an ice wagon on which plaintiff was riding, at a point on First avenue about half way between Battery and Bell streets.

On May 2, 1907, plaintiff and one Hans Rounstad were employed by the Standard Ice Company and were delivering ice. In the course of their duties they were proceeding north on the east side of First avenue. Rounstad was driving, being seated on the right, while plaintiff was seated on the left, both in the driver's seat. As they passed Bell street the off horse became much frightened at a furniture van, and started to rear and jump and to crowd the other horse to the left towards the car tracks. At this time one of defendant's cars was proceeding south on First avenue on the west car track, near Battery street. There was nothing to obstruct the view between the car and the wagon, which were then approximately a block apart and approaching each other. The horses continued to rear and crowd towards and upon the car tracks, the driver trying to pull them back upon the east side of the tracks so as to miss the approaching car, but upon the nearer approach of the car the driver, believing that it would be safer and more likely to avoid a collision with the car, pulled the horses to the left across the track on which the car was approaching, hoping to miss the car by passing it on the west side of the street. The horses and the front part of the wagon passed over the track, but the car struck the right rear wheel of the wagon, throwing it over, the plaintiff falling with one of his legs under it, causing the injuries for which he claims damages.

The negligence charged against the defendant is that its motorman in charge of the car "needlessly and recklessly permitted his car to run against said wagon which he could plainly see and which he could easily have avoided by the exercise of ordinary care and prudence." The defendant denied all negligence on its part and that of its motorman, and alleged that the injuries sustained by plaintiff were caused by his own carelessness and negligence which contributed thereto, and were the approximate cause thereof. A trial before the court and a jury resulted in a verdict in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict, and also for a new trial. These motions being denied, judgment was entered upon the verdict, and the defendant has appealed.

We will first notice appellant's contentions upon its motions for judgment and for new trial, in so far as they challenge the sufficiency of the evidence to sustain the verdict. There was evidence tending to show that the horses, by reason of their fright, especially the fright of the off horse, became uncontrollable so far as the driver being able to keep them on the east side of and off the track of the approaching car; that their frightened condition and the driver's efforts to control them and their tendency to go upon the track that the car was approaching upon could be plainly observed by a person situated as the motorman was upon the front platform of the car, from the time they were nearly a block away from the car until the collision actually occurred; that if the car had been stopped at a very short distance north of where the collision occurred, the rear end of the wagon would have passed over the track and cleared the car without collision; that the motorman could have stopped the car sooner than he did, after seeing the probability of the accident, and avoided the collision, especially if he had the car under proper control; that the driver of the horses was a strong man and an experienced driver, and that he did all that an experienced driver could do to avoid the collision,

and that respondent did nothing, and could do nothing, to avoid the collision. There being evidence tending to show these facts, we think the cause was properly submitted to the jury.

It is contended that the trial court erred in denying the appellant's challenge to the panel of jurors. The challenge was based upon the ground that the jurors were not selected in accordance with chapter 73, p. 131, Laws 1909 [Rem. & Bal. Code, § 103 *et seq.*], but were selected under chapter 146, p. 270, Laws of 1905, as amended by chapter 63, p. 102, Laws of 1907. By the Laws of 1905 and 1907 it was the duty of the superior court to appoint jury commissioners in each county in June of each year. It was the duty of these commissioners to select the names of all qualified jurors in their county and deposit their names, written on separate slips of paper, in a box to be delivered to, and remain in the custody of, the clerk of the court. On the second Saturday of each month it was the duty of the jury commissioners and the clerk to assemble in open court and draw such number of names from the box as the judge might direct for petit jurors to serve during the ensuing calendar month.

This trial occurred on June 24, 1909. The jurors then in attendance upon the court had been regularly selected on the second Saturday in May, 1909, under the Laws of 1905 and 1907 as above briefly outlined. At the time of so selecting the jurors for service during the month of June, that law was in force. At the session of 1909, the legislature enacted a new law for the selection of jurors, being chapter 73, p. 131, Laws 1909 [Rem. & Bal. Code, § 94 *et seq.*]. This law went into force June 8, 1909, as all laws of that session did not having an emergency clause. By this law it is made the duty of the superior courts to divide their respective counties into not less than three nor more than six jury districts, each with equal population as near as may be. It is made the duty of the clerk of the court, during the month of July in each year, to make up a jury list containing

the names of all qualified jurors in each district, to provide boxes for each district, write the names of the jurors upon slips of paper, and deposit the names in the boxes of the proper districts. From these boxes the jury is to be drawn from month to month in a similar manner as under the previous law, except the drawing is done by the clerk of the court without the aid of jury commissioners, and the names are to be drawn in equal numbers from each jury box. The jurors so drawn are to serve for the ensuing month. We have then this situation. The jurors attending upon the court at the time of this trial were regularly selected for service for June, 1909, under a law that was in force on the second Saturday of May, the time of their selection, but was not in force at the time of the trial, because the new law of 1909 had the effect of repealing the prior laws when it went into force on June 8, 1909. *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131. There could be no jury list made up by the clerk of the court under the law of 1909 from which a jury could be drawn to serve during June, 1909, since the first selection of jurors under that law could not occur until July, 1909, so there was no statute law in force during the month of June, 1909, that provided any method whatever for the selection of jurors to attend upon the superior courts of the state during that month.

The argument of learned counsel for appellant is in substance that the superior courts of the state were without power to proceed with jury trials at this time because of this want of statutory law providing for the selection of jurors. The superior courts are created by the state constitution. They possess general original jurisdiction, both in law and equity. Section 6, article 4, of the constitution, wherein their jurisdiction and powers are defined, among other things provides that, "They shall always be open, except on nonjudicial days," and by section 21, art. 1, of the constitution, it is provided that "The right of trial by jury shall remain inviolate." Clearly, the constitution contemplates that the superior

courts of the state shall at all times, except upon nonjudicial days, have power to proceed with their business, and this, of course, includes trial by jury as well as their other business. These are powers which cannot be taken away from the superior courts by anything less than a change in the constitution, unless it can be held that the absence of a statutory method for selecting jurors has the effect of depriving the superior courts of power to procure jurors for the conduct of its jury business. For nearly fifty years the statute law of this state and territory has provided as follows:

"The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." Rem. & Bal. Code, § 143.

In view of the common law source of our jurisprudence, it is more than likely that this would be the rule of decision in this state even in the absence of such a statutory provision. The power of procuring the attendance of jurors upon courts at common law was ample for that purpose before there were any statutes regulating the matter, both in England and America; and the authorities seem to clearly support the view that, in the absence of statutory provisions, the common law method of procuring jurors, that is, by open venire directed to the executive officer of the court, may be resorted to at the present time. 12 Ency. Plead. & Prac., 274; 24 Cyc. 208; 3 Blackstone, 352; *Clawson v. United States*, 114 U. S. 477, 486; *United States v. Beebe*, 2 Smith (Dak.) 292, 11 N. W. 505; *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443; *Berry v. United States*, 2 Colo. 186, 197.

In the case last cited, Chief Justice Hallet in discussing the power of the court to summon jurors in the absence of statutory provisions, at page 198, said:

"It will not be claimed that the powers possessed by courts are entirely derived from the written or statute law. As is well said in a late edition of a standard work, courts did not originate in constitutions. They were known to the common

law, and their powers are there well defined. If courts possessed only such powers as are granted in constitutions and statutes, they could not protect themselves from insult and outrage; they could not compel the attendance of witnesses, or obligations to testify when present; they could not compel the attendance of jurors, nor punish them for improper conduct. Potter's Dwarris on Statutes, 340. In our own law, not only the method of proceedings, but the remedies given to suitors are defined almost entirely by the common law. Of late the judicial power has been regulated by statute more fully than ever before, and still very much of it rests in the common law. That authority is not conferred by statute, is no evidence that it does not exist, for the common law continually supplements the statute law supporting it at every point, and providing for all its deficiencies.

"Of this, the law relating to juries is a good illustration, for, although the qualifications and selection of jurors are now usually regulated by statute, the process for bringing them into court is given by the common law, and their powers and duties are derived almost entirely from the same source."

We have noticed this common law power for the purpose of showing that it exists, and conclude that the superior courts of the state were not prevented from lawfully proceeding with jury trials during the month of June, 1909, simply because there was then no statute law in force providing for the manner of selecting and summoning jurors for service during that month. It is true the jurors in attendance upon the court at the time of this trial were not summoned by common law process, but they were then in attendance upon the court in pursuance of a lawful statutory method which was in force at the time of their selection and coming into court; and no other statutory method was then in existence by which jurors could be selected for service at that time. We are of the opinion that the court could lawfully proceed to trial with the jurors then present, or if there had been no such jurors present, it could have summoned a sufficient number to transact the jury business of the court by open venire as at common law. Appellant's

right to challenge individual jurors, either peremptory or for cause, was not impaired in the least by the manner of selecting or summoning the jury, and this record fails to show the exercise of any such challenge by appellant.

Among other things, the court instructed the jury as follows:

"A person riding in a wagon with another person who is driving a team which is hauling said wagon is not responsible for the negligence of such driver in a case of this kind, unless he caused said driver to be negligent and unless plaintiff's negligence concurs with the negligence of the driver.

"In this case, if you believe that the driver of the ice wagon was negligent, but that plaintiff did not cause such negligence and was not responsible therefor and was not guilty of negligence on his part, then it would be no defense to plaintiff's right to recover against defendant."

This instruction is claimed to be erroneous and prejudicial to appellant, in that it is too general and ignores the relation existing between respondent and the driver. It is argued by counsel for appellant that the negligence of the driver, if any, should be imputed to the respondent by reason of their relation at the time of the accident. There was no evidence tending to show that it was any part of respondent's duty to drive the team, or that he had any supervision or control over the driver. This being true, we think the instruction was not erroneous as applied to the facts of this case. In the case of *Shearer v. Buckley*, 31 Wash. 370, 378, 72 Pac. 76, an instruction was approved by this court upon the same principle which we think will sustain this instruction, the only difference between that case and this being that the injured person in that case was riding in a wagon as the guest or companion of the driver of the horses. But, as in this case, he had no authority or control over the person driving, or the team, and that fact appears to be the principal reason assigned by the court for exempting the injured person from the effect of the negligence of the driver. In addition to the cases there cited, the case of *McBride v.*

Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618, and cases therein cited, lends support to this view.

Other errors are assigned upon the rulings of the court in connection with the examination of witnesses. These we have examined and regard them all without merit. They all relate to matters within the discretion of the trial court. They are not such that we feel called upon to discuss them in detail. We find no prejudicial error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8304. Department One. April 29, 1910.]

J. R. BROWN, *Respondent*, v. J. P. KILDEA *et al.*, *Appellants*.[1]

CORPORATIONS—OFFICERS—INSPECTION OF BOOKS—STATUTES—PENAL STATUTES. Rem. & Bal. Code, §§ 3701, 3702, requiring corporations to keep a stock book and allow an inspection thereof and of papers filed, and providing that any officer failing to do so shall forfeit and pay to the injured party a penalty of not less than $100 or more than $1,000, and all damages resulting therefrom, is a penal statute in so far as the penalty is concerned, and to be strictly construed; since the penalty is not given as compensation for any injury, and was intended as a punishment, allegation and proof of actual injury being unnecessary.

SAME. Construing strictly that portion of Rem. & Bal. Code, § 3702, imposing a penalty in favor of the "injured party" upon any officer of a corporation who shall refuse to exhibit to a stockholder or creditor the stock book or any papers "placed on file," in order to subject an officer to the penalty there must be a demand for inspection of the book named or a designated paper or papers lodged with and kept by the corporation pertaining to the corporate business, and the demand must be made by a party having an interest in such inspection; a demand to inspect the "books and papers" not being sufficient.

[1]Reported in 108 Pac. 452, 1135.

Costs—On Appeal—For Printing Briefs. Where the case was a simple one and could have been presented in a brief of 75 pages, costs of printing a brief of 240 pages will not be allowed in excess of the usual sum for a brief of the smaller size.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 2, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a penalty. Reversed.

C. S. Voorhees and *Reese H. Voorhees*, for appellants.

Burcham & Blair and *H. N. Martin*, for respondent.

Gose, J.—This action was brought by the plaintiff as a stockholder of the Montana Scotch Bonnet Copper and Gold Mining Company, a corporation, against the defendants, its officers and trustees, for the recovery of a penalty, and is based on §§ 3701 and 3702, Rem. & Bal. Code, which are as follows:

"§ 3701. It shall be the duty of the trustees of every company incorporated under this chapter to keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners of such shares, which book, during the usual business hours of the day, on every day excepting Sunday and legal holidays, shall be open for the inspection of stockholders and creditors of the company, at the office or principal place of business of the company; and any stockholder or creditor of the company shall have the right to make extracts from such book, or to demand and receive from the clerk or other officer having the charge of such book a certified copy of any entry therein, or to demand and receive from any clerk or officer a certified copy of any paper placed on file in the office of the company; and such book and certified copy shall be presumptive evidence of the fact therein stated in any action or proceeding against the company or any one or more of the stockholders."

"§ 3702. If at any time the clerk or other officer having charge of such book shall make any false entry, or neglect

to make any proper entry therein, or having the charge of any papers of the company shall refuse or neglect to exhibit the same, or allow the same to be inspected or extracts to be taken therefrom, or to give a certified copy of any entry, as provided in the preceding section, he shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the injured party a penalty of not less than one hundred dollars nor more than one thousand dollars, and all damages resulting therefrom, to be recovered in any action of debt in any court having competent jurisdiction; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect, to be sued for and recovered in the name of the people in the superior court of the county in which the principal place of business of the corporation is located."

The official dereliction charged is that the defendants, having charge of "the books and papers" of the corporation, pursuant to "a concerted and agreed course of action," refused the repeated demands of the plaintiff that he be allowed to inspect them. The prayer is for a judgment for $1,000, the maximum penalty under the statute, and for costs. A general demurrer having been overruled, the defendants answered jointly, admitting that they are the officers and trustees of the corporation, and joining issue on the other averments of the complaint. The case was tried to a jury, which returned a verdict for the plaintiff in the sum of $850. From a judgment entered on the verdict, the defendants have appealed.

The appellants objected to the introduction of any testimony, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and at the close of the respondent's evidence, moved the court to withdraw the case from the jury. After verdict the appellants moved for a judgment notwithstanding the verdict.

The appellants contend that the statute is a penal one and should be strictly construed, whilst the respondent asserts that, in so far as it affects the case at bar, it is remedial

and should receive a liberal interpretation. We think the appellants have the correct view of the statute. Under the statute the officer who violates its provisions is deemed guilty of a misdemeanor, the penalty to the state being imprisonment in the county jail not more than one year or by fine not exceeding $500, or by both such fine and imprisonment (Rem. & Bal. Code, § 2984); and to the "injured party a penalty of" not less than $100 nor more than $1,000, and all damages which he sustains. We agree with the learned trial court that a statute may be penal in part and remedial in part. The remedial part of this statute, however, is the provision for the recovery of actual damages. The penalty is not imposed as compensation, but as a part of the punishment of the offending officer. A statute which subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury, is a penal statute. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188; *Derrickson v. Smith*, 27 N. J. L. 166; *Southern Building & Loan Ass'n v. McCants*, 120 Ala. 616, 25 South. 8; *Casey v. St. Louis Transit Co.*, 116 Mo. App. 235, 91 S. W. 419; *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006; *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

The respondent, among other cases, cites: *Huntington v. Attrill*, 146 U. S. 657; *Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109, 61 Am. St. 785, 33 L. R. A. 110; *Reed v. Inhabitants of Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Mansfield v. Ward*, 16 Me. 433. We do not think these cases support the respondent's contention. In *Huntington v. Attrill*, a judgment was obtained in the state of New York against a director in a New York corporation, for the amount of the debts of the corporation, for making oath to a certificate which he knew to be false. In a suit upon the judgment in the state of Maryland, the court of that state refused to enforce it, because the statute imposing the liabil-

ity was penal in its nature. The supreme court held that it was not penal within the maxim of the international law that "the courts of no country execute the penal laws of another," and that the full faith and credit clause of the Federal constitution required the courts of Maryland to give it effect. It was said, however: "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal in the sense that it should be strictly construed." In *Aylsworth v. Curtis*, in discussing the distinction between penal and remedial statutes, it was said that, where an action is founded entirely upon a statute having for its object the recovery of a penalty or a forfeiture, the statute is clearly penal; but that, where it gives the injured party enhanced or double damages for a wrong suffered or a right violated, it is remedial. In *Reed v. Inhabitants of Northfield* the court, speaking through Mr. Chief Justice Shaw, said:

"And where the statute gives a penalty, and the thing sued for is pursued as a penalty, although the right to sue is given only to the party grieved, and even though the whole penalty when recovered shall go to the party grieved, still the same rule may apply, because the form of proceeding is still for a penal sum, and the ostensible and real object of the suit, in form at least, is punishment";

but that a law which gives enhanced damages is remedial. In *Mansfield v. Ward*, it was held that a statute was penal which provided for the recovery of a penalty without reference to the actual damages sustained. Statutes permitting recovery of double and treble damages have been usually classed by the courts as remedial, on the ground that they sustain a relation to the actual damages suffered. Under our statute a stockholder owning one hundred shares of stock is allowed the same recovery as a stockholder owning one hundred thousand shares of stock. It is apparent, therefore, that the penalty was intended as a punishment, and in no sense as indemnity or compensation.

Applying this rule of construction, it is apparent that the book referred to in § 3702 is the stock book mentioned in § 3701, and that the papers referred to in § 3702 are the papers "placed on file" within the meaning of the preceding section. The statute does not define what constitutes the filing of a paper, but the reasonable interpretation is that it must be some paper lodged with and kept by the corporation and pertaining to its corporate business. If the clerk or other officer having charge of such paper refuses to exhibit it or refuses to allow it to be inspected or extracts to be taken from it, he is penalized in favor of the *injured* party. What is meant by the phrase "the injured party"? The variety and magnitude of the corporate business of the state forbids a construction which would impose a penalty upon an officer who refused an inspection where the demand was prompted by curiosity or a desire to vex or harass the management. It would hardly be contended that every stockholder in a banking corporation has the right to inspect all the checks of its patrons, or that he may demand as of right to inspect escrow contracts or other papers kept for the accommodation of third parties. To subject the offending officer to the payment of the statutory penalty there must be a demand for an inspection of the book named in the statute, or a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business, and the party making the demand must have an interest in inspecting the paper, and there must be a refusal to comply with the demand. Measured by this interpretation, the demand pleaded to inspect the books and papers does not meet the requirements of the statute. A consideration of the evidence discloses that the respondent demanded of each of the appellants the privilege of inspecting "the books" in order that he might convince them that he was a stockholder, a fact which the appellants were denying. The court instructed the jury to disregard that part of the complaint and the evidence pertaining to a demand to see the books,

and submitted the case upon the evidence of a demand and refusal for an inspection of the papers. There was no evidence showing a demand for any designated paper, and no substantial evidence showing a demand for any paper or papers, or showing that the appellants were in possession of any paper. The motion for a judgment notwithstanding the verdict should have been granted. What we have said must not be construed as modifying the rule announced in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. That was a mandamus proceeding by a stockholder in a corporation to enforce his right to inspect the books of account in order that he might learn the condition of its affairs.

The judgment is reversed, with directions to dismiss the action.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

MOTION TO RETAX COSTS.

[Decided May 26, 1910.]

PER CURIAM.—The appellants have filed a cost bill for $193.50, for printing their brief on appeal. No reply brief was filed. The opening brief contains two hundred and forty-four pages. The respondent has filed exceptions to this item, and contends that the issues could have been properly presented in a brief of seventy-five pages. He has also filed an affidavit showing that the current rate for printing briefs in Spokane, where the case was appealed, was, at the time of the printing of the appellants' brief, seventy-five cents per printed page. The issue was a simple one, involving the construction of two sections of the statute. We think the appellants' view of the case could have been presented in a brief of seventy-five pages. This item will be allowed to the extent of $57, and disallowed as to the remainder.

[No. 8558. Department One. April 29, 1910.]

JOSEPH BERNARD *et al.*, *Appellants*, v. ANDREW BENSON *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—RECORD OF CONTRACT—NOTICE—STATUTES. Construing together the recording acts, executory contracts for the sale of real estate, while not expressly mentioned, are included within the meaning of the words "deeds, grants and transfers of real property," and may be recorded, especially in view of the custom to record the same.

EVIDENCE—JUDICIAL NOTICE—CUSTOM—RECORDS. The court will take judicial notice of the custom to record executory contracts for the sale of real estate, and to record instruments affecting the title to real property in Deed Records, incumbrances in Mortgage Records, and evidences of title to personal property in Miscellaneous Records.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORD—NOTICE. Under Rem. & Bal. Code, § 8785, requiring the county auditor to procure such "books for records as the business of the office requires," and in view of the uniform custom to record instruments affecting the title to real property in Deed Records, and of personal property in Miscellaneous Records, the record of an executory contract for the sale of real estate in Miscellaneous Records does not import notice.

SAME—ACTUAL NOTICE—POSSESSION OF PROPERTY. Actual notice of an executory contract for the sale of real estate, recorded in the wrong book, is not to be imported from the fact that one of the vendees had slashed about two acres of the tract, where he had subsequently abandoned the same; nor by the fact that the cattle of such vendee and of others ranged upon the property; nor by the fact that one of the vendees lived in a small house either on the property or in a county road, where such vendee did not assert any claim or right to possession in conversations with the *bona fide* purchasers.

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RIGHTS—NOTICE. A *bona fide* purchaser from a *bona fide* purchaser is not affected by subsequent notice given to his vendor.

SPECIFIC PERFORMANCE—RIGHTS OF THIRD PERSONS. Specific performance of an executory contract of sale will not be decreed, as against a subsequent *bona fide* purchaser who had notice of the

[1]Reported in 108 Pac. 439.

contract before he had fully paid for the land, where he had assumed payment of a debt, incurred liability on a note, and entered into possession and made valuable improvements in good faith; as the enforcement of the contract would be oppressive to an innocent third party.

VENDOR AND PURCHASER—DEFECTS IN TITLE—RIGHTS OF VENDEE. The purchaser of a tract of land, who finds that part of the land is owned by a third party, from whom he purchased such part, is entitled to a credit for the sum paid for such part.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 3, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

J. C. Cross and *W. I. Agnew* (*A. Emerson Cross*, of counsel), for appellants.

W. H. Abel, for respondents.

GOSE, J.—The plaintiffs in this suit seek specific performance of an executory contract, and have appealed from the decree. The record discloses the following material facts: On the 28th day of August, 1903, the Northwestern Lumber Company, the owner of the real estate in controversy, entered into a contract with the appellant Joseph Bernard, whereby it agreed to convey the property to him. The contract was filed for record in Chehalis county, where the land was situated, on September 2, 1903, and recorded in Miscellaneous Records. On May 31, 1905, the appellant Joseph Bernard filed for record a homestead declaration which was recorded in Miscellaneous Records. On March 9, 1907, he contracted to convey a part of the land to one Sorenson. The contract was filed for record March 25, 1908, and recorded in Miscellaneous Records. On November 6, 1907, the appellant Joseph Bernard entered into a contract with the respondent Andrew Benson, whereby it was agreed that the latter should pay the balance due upon the contract with the lumber com-

pany, take a deed in his name, and convey to Salme, Eberwine, and Sorenson, respectively, upon payment by them of the purchase price, specific tracts which appellant Joseph Bernard had contracted to them, retain for himself a tract which Bernard had contracted to him, and, upon payment of the balance of the purchase price, convey the remainder to the appellant Emma Bernard. The Salme and Eberwine contracts were not recorded. On November 8, 1907, the lumber company conveyed the land to the respondent Andrew Benson, and the deed was filed for record on November 13 following, and duly recorded. Benson conveyed to Salme and Eberwine, but did not convey to either Sorenson or Emma Bernard. On the 25th day of January, 1908, the respondents Benson and wife conveyed the land in controversy to the respondent Charles Knokey, by a deed of general warranty which was filed for record February 5, 1908, and duly recorded. The consideration for the conveyance of this tract of land was $1,600, of which $186 was paid in cash, Knokey agreeing to pay a mortgage on the land amounting to $1,040, and assuming the payment of a note of $350 which Benson was owing to another party.

Before conveying to Knokey, the respondents Andrew Benson and his wife had mortgaged the land in controversy for the purpose of paying the purchase price to the lumber company. About March 1, 1908, the respondents Knokey and wife sold to the respondent Fred Lubbe a parcel of the land containing about six acres and a half, for $400, $300 of which was then paid, and the balance of $100 was paid on May 6 when the deed was delivered. The respondents Knokey and wife took possession of the land immediately after the purchase, and the respondents Lubbe and wife took possession of the tract which they had purchased about March 8, 1908, and before receiving the deed. The Knokeys and the Lubbes each began clearing the land, and the latter at once ordered lumber for a house which they later built on their

land. The entire tract was logged off timber land, unimproved and uninclosed, when Knokey and Lubbe purchased. Other essential facts will be stated later in connection with the related subjects.

The appellants contend that the recording of their executory contract, declaration of homestead, and the Sorenson contract imparted constructive notice, and that the respondents Knokey and Lubbe are not innocent purchasers. The respondents assert that the recording did not import notice, (1) because there is no statute in this state authorizing the recording of an executory contract for the sale of real estate, and (2) because the several instruments, including the declaration of homestead, were recorded in Miscellaneous Records. We will consider these points in the order suggested.

We think the first proposition is untenable. The code, Rem. & Bal. Code, § 8785, requires the county auditor to procure "such books for records as the business of the office requires." Section 8786 makes it his duty to record separately, in "large and well-bound books," "deeds, grants and transfers of real property," and all other papers or writings required by law to be recorded. Section 8781 provides that "all deeds, mortgages, and assignments of mortgages, shall be recorded" in the office of the county auditor of the county where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record. Section 8784 provides that, "every instrument in writing purporting to convey or encumber real property," which has been recorded in the proper office, shall import notice to third parties. It is true, contracts for the sale of real estate are not expressly mentioned in the recording statutes, but we think they are included within the meaning of the words, "deeds, grants and transfers of real property." They are within the spirit of the statute, liberally interpreted. 2 Am. & Eng. Ency. Law (2d ed.), § 78. In construing a statute, all acts *in pari materia* will be read together, and where the meaning of a statute is not clear or it is ambiguous, obscure,

or indefinite in any respect, contemporaneous construction may also be resorted to in arriving at the intention of the law makers. We think we may properly take judicial notice of the fact that it has been the custom in this state to record such instruments. The construction contended for by the respondents would be productive of great mischief. Our construction is not in conflict with the points decided in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742, and *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

We think the respondents' second point, that the recording of an executory contract for the sale of real estate in Miscellaneous Records does not impart notice, must be sustained. As we have seen, the code, Rem. & Bal. Code, § 8785, requires the county auditor to procure such "books for record as the business of the office requires." The custom has been uniform throughout the state to record all instruments affecting the title to real estate in Deed Records, those creating an incumbrance against real estate in Mortgage Records, and those evidencing title to personal property in Miscellaneous Records. This custom has been so general and has existed for so long a period of time that it is our duty, not only to judicially notice it, but to apply it as well. In *Ritchie v. Griffiths*, 1 Wash. 429, 25 Pac. 341, 22 Am. St. 155, 12 L. R. A. 384, it was held that a deed must be properly indexed by the auditor and recorded in the proper record before operating as a constructive notice, and that constructive notice does not arise from an attempt to comply with the registry laws. In *Ames v. Miller*, 65 Neb. 204, 91 N. W. 250, the court said that the registry law should mean something, and that one claiming an interest in real estate should comply with the letter and spirit of its provisions, and thus prevent injury and damage to those who deal with reference to the record title.

The appellants contend that the respondents Knokey and Lubbe had actual notice of their relation to the property

through the possession of Sorenson and Mrs. Swedblum. In July or August, 1907, it is claimed that Sorenson slashed about two acres of land on the part of the tract which Bernard had contracted to him, and that his cattle were pastured on the entire tract. It is admitted that the slashing was done, but it is not certain that it is on the property in controversy. Moreover, the trial court was justified in finding that Sorenson had abandoned his contract. The record shows that Sorenson's cattle and the cattle of others ranged upon the property, but the testimony as to the land being inclosed is involved in too great doubt to make the pasturing of the cattle the basis for holding that it was sufficient to give notice, or put a purchaser upon inquiry. Mrs. Swedblum lived in a small house, but whether upon the land purchased by Lubbe or in the county road we cannot determine from the evidence. However, it is not important, as she is not making any claim, and did not make any claim to the property, or assert any right to the possession, in her conversations with Knokey and Lubbe. Nor did she inform them that Bernard made any claim to the property.

"No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith." *United States v. Detroit Lumber Co.*, 200 U. S. 321, 332.

What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. Benson was the owner of the record title, and there was no such possession as would impart notice or make it the duty of the purchaser to inquire.

It is next urged that, because Knokey received notice after paying $186 and before paying the balance of the purchase price, equity will only protect him to the extent of the sum paid before receiving notice of Bernard's rights; and that,

Lubbe having received notice before the property was actually conveyed to him, equity will not protect him even to the extent of the $300 paid before he received notice. Knokey received actual notice of Bernard's claim about March 15, 1908, about two months after the property was conveyed to him, and Lubbe received notice about the same time. It is fundamental that, if Knokey was a *bona fide* purchaser, Lubbe, his grantee, took the property freed from any rights of appellants, regardless of notice to him; and that, if he took without notice, it is not material whether Knokey, his grantor, was a *bona fide* purchaser. Knokey being a *bona fide* purchaser, it is material to consider the extent to which he will be protected.

It cannot be questioned that there is authority to support the appellants' contention that he can only be protected to the amount of his payment before receiving notice. As applied to this case, however, such a conclusion would be highly inequitable. The appellants, by their own acts, made Benson the owner of the record title. It is true that, in conveying to Knokey, Benson violated his trust, but the fault is with the appellants and not with the purchaser. We have seen that Knokey paid a part of the purchase price and assumed the debt of his grantor for the remainder, which he later paid to the extent of $1,040. His liability still exists for the payment of the $350 note. He also went into the possession of the property and in good faith made improvements. The appellants have tendered to Benson the purchase price of the property, but have tendered nothing to Knokey. Moreover, they allege in their complaint that Knokey colluded and connived with Benson to defraud them. When he assumed payment of the note and mortgage, he became liable to the payee. Whether in a suit to enforce payment against him he could have pleaded a failure of consideration, it is not necessary to decide. If the appellants intended to seek specific performance against him, it was their duty to take such steps as would protect him. While the mortgage was given by Ben-

son, the money derived from the loan was used in paying the purchase price of the land. The real benefit of the mortgage loan accrued to the appellants. The court directed a conveyance of the remaining land to the appellants. Benson derived no benefit from the mortgage. He used the proceeds to pay for the property. We think the true rule, and the one which best harmonizes with the broad principles of equity, is that specific performance will be denied when rights of innocent third parties have intervened so that the enforcement of the contract would be harsh, oppressive, or unjust to them. 6 Pomeroy, Equity Jurisprudence, § 794; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Carlisle v. Carlisle*, 77 Ala. 339; *Hale v. Bryant*, 109 Ill. 34. The appellants cannot justly complain of this rule. By their own negligence they placed it in the power of Benson to sell the land, and now to permit them to set aside the sale would defraud innocent parties. As against them the record should be held to import absolute verity.

The decree directs a conveyance to the appellants of that part of the land now held by the Bensons, except the tract contracted to them by Bernard in 1903, and finds that Benson has received from sales of the land $7.85 in excess of the purchase price paid by him; and a judgment is entered in favor of the appellants and against the Bensons for that sum. The point is made that the court erroneously allowed Benson a credit of $226.85. As we have seen, in 1903, the appellants contracted to Benson a part of the land embraced in their contract with the lumber company, and their trust agreement with Benson directs him to retain that tract. After receiving a deed for the land from the lumber company, it was discovered that a part of the land which the appellants had contracted to Benson was owned by a third party from whom Benson later purchased it. These facts are affirmatively pleaded in Benson's answer, and we think the evidence justified the trial court in allowing him this credit.

The decree is affirmed, without prejudice to the appellants' right to maintain an action at law against Benson for damages for breach of the contract.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

[No. 8305. Department One. April 29, 1910.]

In the Matter of the ESTATE OF LAWRENCE STATLER, *Deceased*, J. E. MULLEN, *Administrator*, *Appellant*.[1]

WILLS—PROBATE—CONTEST—COSTS—ALLOWANCE—EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE. The costs and expenses incurred for attorney's fees in contesting the probate of a will are not a claim against the estate of the deceased which must be presented to the administrator for allowance, and they are properly allowed, when the will is held void, as a judgment against the estate, under Rem. & Bal. Code, § 1313, after a citation to the administrator and a hearing before the court.

SAME—PROCEEDINGS—COSTS—SECURITY FOR. A proceeding against an administrator by citation, to secure allowance of costs for contesting the probate of a will, is but a continuation of the probate contest, and a bond for security for costs by nonresident contestants cannot be required.

SAME—COSTS—PARTIES ENTITLED—"BENEFIT" TO ESTATE. Costs and attorney's fees for contesting the probate of a will may be allowed as a "benefit" to the estate, where the contestants were successful and the expenses when allowed reduce their residuary share in the estate.

SAME—AMOUNT OF COSTS. Costs and attorney's fees for contesting the probate of a will are not confined to the costs allowed by the general statutes, Rem. & Bal. Code, § 481; but are governed by the special statute, Id., § 1313, in which no limitation is fixed.

Appeal from an order of the superior court for Spokane county, Sullivan, J., entered February 20, 1909, awarding costs and attorney's fees in the contest of a will, after a trial on the merits before the court without a jury. Affirmed.

[1]Reported in 108 Pac. 433.

O. C. Moore, W. H. Winfree, and *Happy, Winfree & Hindman,* for appellant.

W. S. Lewis and *Joseph Rosslow,* for respondent.

FULLERTON, J.—Lawrence Statler died in Spokane county on January 24, 1908, leaving estate therein consisting of real and personal property. Shortly thereafter certain persons petitioned the court of that county to admit to probate what was alleged to be the nuncupative will of the deceased. After notice given, one O. Lohan, as German consul and as attorney in fact for certain heirs of the deceased, appeared and contested the validity of the will and its admission to probate. On the hearing the court adjudged and decreed the will to be null and void as the last will and testament of the deceased, and denied its admission to probate.

In its decree the court ordered that "the matter of awarding costs and expenses including attorney's fees to contestants" be continued to a day certain, and that the contestant serve upon the administrator of the estate his application for such an order, and a citation to the administrator requiring him to appear and show cause why the application should not be granted. The application and citation were filed and served as directed, and on the return day the administrator appeared specially and moved to quash the same, on the ground that the process by which it was sought to bring him into court was insufficient to give the court jurisdiction of his person or the subject-matter of the controversy. The motion to quash was denied by the court, whereupon the administrator, "reserving all rights under the special appearance heretofore made and not waiving his special appearance, and protesting against being compelled to proceed further," moved that the applicant be required to furnish a bond as security for such costs as might be awarded against him should he be unsuccessful in his application. This motion was also denied. The administrator

thereupon, still reserving his special appearance, demurred to the application, which demurrer being overruled, he answered to the merits. On the hearing the court awarded the contestant $124 as costs, and $750 as attorney's fees, and the administrator prosecuted this appeal.

The appellant contends that the expenses and attorney's fees sought to be recovered by the respondent constitute what is denominated in the statute a claim against the estate of the deceased, and before a proceeding at law will lie to recover them, they must be presented to the administrator as a claim for allowance or rejection; and further, that should the claim be rejected by the administrator and a proceeding begun to establish the same, the proceeding must be an ordinary civil action at law, in which the administrator is brought into court by the service of a summons as in civil actions generally. But we are unable to agree with these contentions. The costs and expenses of contesting the probate of a will are not a claim against the estate of the deceased in its broad sense. The deceased did not incur them, nor can they be in any sense his obligations. They are collectible out of his estate simply because the statute makes them so. Rem. & Bal. Code, § 1313; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677, 69 Pac. 375. In this instance they might properly have been entered as a judgment against the estate in the decree setting aside and annulling the will, and it does not make the proceeding an independent action merely because the court set the matter down for a separate hearing and directed that the administrator be given notice and an opportunity to contest the amount of the allowance if he so desired. There was, therefore, no mistake in the form of the proceeding, and the motion to quash was properly overruled.

The cases of *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480, and *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, cited by the appellant, do not sustain his position. In the first cited case the court was speaking of claims that were

incurred by the deceased in his lifetime, not expenses incurred after his death in protecting the estate against unfounded claims; and in the second the question was as to the validity of certain allowance made by the court *ex parte*, and the point decided could only be in point in case we should hold this order to be an *ex parte* order, made without jurisdiction on the part of the court.

For the reason that this proceeding is but a continuation of the proceeding brought to annul and cancel the purported nuncupative will, it was not required that the respondent furnish a bond as security for costs.

The appellant next contends that the respondent's services were without value to the estate, and, hence, since the claim is based upon benefits to the estate, there can be no recovery. Considering the estate an an entity apart from the interest of its beneficiaries, it is probably a legitimate argument to say that it can make no difference whether the property of the estate is taken by one set of claimants or by another. But we do not understand that this is what is meant by benefiting the estate. The contest is made by one set of claimants against another, and the benefit derived therefrom inures to the successful claimants, and this we think is the benefit contemplated by the rule. Since the expenses when allowed reduce the residuary share of the successful claimants, they might justly complain if no gain was derived by them by the contest, but when the contest results in their gain, clearly it furnishes a sufficient consideration for the allowance contemplated by the statute.

Lastly, the appellant argues that the allowance when made cannot exceed the amount allowed as costs by the general statutes. Rem. & Bal. Code, § 481. We think, however, that the allowance is governed by the special statute. Rem. & Bal. Code, § 1313. True, the phrases used are general,—"fees and expenses," "cost and expenses," etc., and no limitations are fixed, yet we think it contemplates the allowance of the actual court costs and such expenses incurred in the

prosecution or defense of the will as are reasonable and necessary. It is not contended, as we understand the record, that the allowances in this instance were not so.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8306. Department One. April 29, 1910.]

MARGARET GILMORE, *Respondent*, v. CONTINENTAL CASUALTY COMPANY, *Appellant*.[1]

INSURANCE — ACCIDENT INSURANCE — PAYMENT OF PREMIUMS BY AGENT—DEATH OF ASSURED—TERMINATION OF AGENCY—FORFEITURE OF POLICY. The agency of a railroad company for its employee carrying accident insurance, for the purpose of paying the premiums out of earnings, is terminated by the death of the assured employee, so that an erroneous return by the company made after the death, representing that nothing was due the employee and that the policy had lapsed, is not binding upon the beneficiary and does not work a forfeiture of the policy.

SAME—PAYMENT OF INSTALLMENTS—POLICY—TIME FOR PAYMENT. An accident policy, insuring a railroad employee, the premiums to be by the railroad company deducted and promptly paid out of the assured's wages, and which fixes no specific time for the payment of the premiums, requires only that they be paid within a reasonable time; and a delay of three days after the end of the month is not unreasonable; nor would there be any default in payment of an installment where it was understood that the same was to be paid on pay day at the latter end of the succeeding month, and the assured was killed before pay day.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered April 26, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on an accident insurance policy. Affirmed.

[1]Reported in 108 Pac. 447.

Roche & Onstine (*Manton Maverick*, of counsel), for appellant.

Plummer & Latimer, for respondent.

FULLERTON, J.—On September 16, 1907, the appellant issued to one Nate Gilmore, a freight brakeman in the employ of the Northern Pacific Railway Company, an accident insurance policy, whereby it promised, among other things, to pay to the respondent the sum of one thousand dollars in case of the death of the assured by accident during the life of the policy. The life of the policy was fixed at one year, subject to lapse for the nonpayment of any premium installment. The assured did not pay any part of the premium at the time of the issuance of the policy, but to provide therefor gave to the appellant the following order directed to the paymaster of his employer:

"Please pay for me to the Continental Casualty Company the sum of Forty and no-00 ....Dollars and charge the same against my pay account for services rendered or to be rendered by me.

"This order is given to provide for the payment on a policy of insurance for which I have this day made application, and you are authorized and requested to pay the said sum in installments, as follows:

"1st installment of $10.00 to be paid from my wages for the month of October, 1907.

"2nd installment of $10.00 to be paid from my wages for the month of November, 1907.

"3rd installment of $10.00 to be paid from my wages for the month of December, 1907.

"4th installment of $10.00 to be paid from my wages for the month of January, 1908;

and further, at the option of the Continental Casualty Company, to pay any installment, payment of which has been defaulted, from any reason whatever, from my wages from any month thereafter succeeding. It is understood and agreed, with respect to these installments, (1) that if each and every one of them be promptly paid as above specified, then and in that event only, they shall pay for my insur-

ance under a policy to be issued to me by said company, bearing even date and number herewith, for respective periods, to wit: The first installment, two months; the second installment, two months; the third installment, three months; and the fourth installment, five months; in their successive order as herein given; (2) that said railway company is my agent for the purpose of making such deductions, and I will promptly notify its Auditor of Disbursements of any change in my employment, either as to class of service or location; (3) that I hereby release the said Railway Company from all liability on account of failure to make deductions arising from any cause whatever; and (4) that if for any reason whatever payment of any installment be not made as above specified then all my rights under said policy and the rights of my beneficiary thereunder shall at once terminate and be void. I hereby waive for myself and for my beneficiary under said policy any notice of payment or non-payment of said installments, and I agree that should default be made in any payment of the above specified installments and the defaulted installment be afterwards paid as provided above, then and in that event such payment shall reinstate only from the time of the receipt of such payment at the general office of the Continental Casualty Company.

"I agree that should I be discharged from or cease to be in the services of said Railway System before the first of said installments becomes due, then all my rights and rights of my beneficiary in said policy shall immediately cease, unless I notify the Secretary of said Continental Casualty Company in writing within three days after leaving said service, and remit said installment with said notice.

"I understand that no agent of the company has any authority or power to waive or change any of the printed provisions herein.

"In consideration of the acceptance of this order or assignment of wages by the above named railway company, the undersigned hereby agrees that the same shall not be revoked, cancelled, and annulled by notice to said railway company, or otherwise."

The appellant at that time was doing, and had theretofore done, a large insurance business with the railway company's employees, from each of whom it had received an order similar to the foregoing. It had also entered into an agree-

ment or understanding with the railway company by which the railway company had undertaken, for a consideration of five per centum of the amount collected, to deduct from the wages of the several employees the premiums due for each particular month, and forward the same to the appellant. The practice of the appellant was to turn over to the railway company's auditor of disbursements the several orders as fast as they were received. Towards the end of each month it would forward to the auditor a list or statement showing the names of the several persons assured with the amount of premium due for that month, together with such other data as would enable the auditor to identify the persons named, and that officer would, when making up the accounts of the assured, deduct from their wages the amount of the premiums due and forward the amount to the appellant less the commission charged. The remittance was usually made about the twentieth day of the month succeeding the month the premium fell due.

This procedure was followed in the present instance. On receiving the order in September, the appellant forwarded it to the railway company's auditor of disbursements. Towards the latter part of October a statement was sent the auditor containing a list of the names of the employees of that company who held insurance in the appellant company, and from whom premiums were due out of their October wages. In this list was the name of the assured in question here. The statement showed ten dollars to be due from Gilmore for the month of October, and this sum was deducted by the auditor from Gilmore's October wages and forwarded the appellant, less the commission above mentioned, the remittance being made about the twentieth day of November. Towards the end of November the appellant forwarded to the auditor a similar statement, showing the amounts due on November premiums. This was duly received by the auditor, who returned it about the twentieth of the following month, after making up the November

accounts, without remittance on the claim against Gilmore; the reason for the failure to make the remittance the auditor expressed on the statement by the words "Lapsed. Nothing due." In the meantime the assured had been killed by accident while in the performance of his duty. His death occurred on December 3, 1907, several days prior to the time the auditor made his return to the insurance company, but whether the auditor knew of his death at that time the record does not disclose.

The method adopted by the railway company for keeping the time of its several employees and making payment of their wages is not made very clear by the record. It can be gathered therefrom, however, that the trainmen's time, such as brakemen, was reported by the train conductor to the trainmen's timekeeper, who, after tabulating it, forwarded the tables to the auditor of disbursements. The conductor reported at the end of every run, usually by "railroad" mail, and owing to the distance of the conductor from the timekeeper, it frequently happened that the reports of the conductor of work performed on the last days of the month would not reach the timekeeper in time to be included in the timekeeper's report to the auditor, which latter report included only the conductor's reports received up to 12 o'clock noon on the first of each month. The effect of this was that frequently a part of an employee's earnings for one month would be carried over and paid by the auditor as earnings of the succeeding month. It was so with Gilmore's earnings for the months of October and November. He was working on extras which were not upon the railway time card and had no special time, but were run upon orders from station to station. He was paid on a mileage basis, both the distance traveled and overtime put in counting to make up the mileage. In October the assured made his last trip on the last day of the month, at which he earned $6.22. This sum was not turned in to the timekeeper in time to be reported as October earnings, and was consequently car-

ried into the November account. The only work the assured performed in November was on the last two days of the month, during which time he earned $10.43. This sum, likewise, was reported to the timekeeper too late to be included in the November earnings, so was carried to the December account. Thus the account as it appeared in the office of the auditor of disbursements in December, when he made the report of nothing due to the insurance company, showed only $6.22 to the credit of Gilmore.

There is a dispute in the evidence as to the amount of Gilmore's earnings in November, which may be well to notice here. The trial court found his earnings to be $10.43, and we have accepted the finding as true. It is supported by the evidence of the conductor with whom Gilmore operated and who reported his time to the timekeeper, and by the timekeeper who made up the time tables and turned them over to the auditor of disbursements. That officer, however, testifying for the insurance company, states that Gilmore's earnings for that month were only $9.92. His testimony, however, is in some respects unsatisfactory. For example, on cross-examination he gave the number of miles with which Gilmore was credited in November as 392, whereas, both the conductor who reported the mileage, and the timekeeper who tabulated it, say that he was credited with 418 miles, and no explanation of the difference is given. Again, he testifies that he had the account of Gilmore's November earnings at the time he reported to the appellant in December. In this he is not only contradicted by the timekeeper, but it forced him into another dilemma. If he had that account he also had the balance carried over from October which would have made more than enough, according to his own figures, to pay the insurance premium. To escape this he gave the earnings carried over from October as earnings for December, testifying that the amount earned by Gilmore in the two days of that month preceding his death was $11.40, whereas the conductor's time slips, as reported by

the timekeeper, show only $4.55 earned for these two days; that is to say, the conductor's and trainmen's timekeeper of the railway company make up the amount due Gilmore in the hands of the company at the time of his death in the following manner:

"Earnings in October, 1907.....	$6.22
"Earnings in November, 1907.....	10.54
"Earnings in December, 1907.....	4.55
"Total.....	$21.31"

Whereas, the auditor makes up the account by the following credits:

"Earnings in November, 1907.....	$9.92
"Earnings in December, 1907.....	11.40
"Total.....	$21.32"

It will be noticed that the auditor has not materially changed the totals as returned by the timekeeper, but has simply revamped the tables on which the totals are based. The auditor makes clear another matter also, namely, that he was in error in his report made to the appellant in December to the effect that there was nothing due the assured from the railway company, as the company had in its possession at that time, according to his present computation, more than double the amount necessary to liquidate the November premium.

After the death of Gilmore the respondent, as his beneficiary, obtained the necessary data and was proceeding to make proofs of his death and her right to the benefits declared in the policy, when she was notified by the insurance company's officers that the company denied any liability under the policy because of the nonpayment of the November premium. This action was thereupon begun, resulting in a judgment in her favor.

The appellant relies chiefly for a reversal of the judgment on the fact that the November premium was not paid. It

argues that by the express terms of the paymaster's order, given it by the assured, the railway company was made the agent of the assured, and that in consequence any statement made by that company through its officers, whether true or false, was binding on the assured, so that when the auditor of the railway company returned to it the November statement of premium due, without remitting the amount thereof, it released the appellant from all liability under the policy. But this argument overlooks the fact that the death of the assured had occurred prior to the time this return was made. It is the almost universal rule that the death of the principal puts an end to the agency, the only exception thereto being the case where the agency is coupled with an interest. 2 Enc. L. & P. 1256. Therefore, at the time the return relied upon was made, the authority of the railway company to represent the appellant had ceased, and its statements and acts, although purporting to represent the assured, were no more binding upon the heirs of the assured, or the beneficiary entitled to his life insurance, than would be the statements of any person not having legal authority to represent his estate.

The rights of the parties under the policy of insurance must be determined by the conditions existing at the time of the assured's death. If at that time he was in default in the payment of any installment of premium owing upon the policy, then, clearly, the beneficiary under the policy cannot recover thereon. On the other hand, it is just as clear that if there was no default at that time there is such liability. This question must be determined by the terms of the contract between the appellant and the assured.

By reverting to the paymaster's order, which was made to supersede the condition expressed in the policy with reference to payments of premiums due, it will be observed that no definite time is fixed for the payment of any one of the installments provided for. The only requirement is that they shall be paid promptly out of the assured's wages for a

particular month. This, without further limitation or understanding, would mean that the assured, through his agent, had a reasonable time within which to make the payment. But we think a definite time of payment was implied by the agreement of the parties in this instance. Both the assurer and the assured were acquainted with the system adopted by the assured's employer for making payment to its employees. It was understood that the earnings of the employee for any particular month would not be paid until the latter end of the succeeding month, and that no remittance would be made on the premium until pay day arrived, even though funds were in the hands of the employer applicable to that purpose on the first day of the succeeding month. It must follow therefrom that there would be no default until pay day arrived. But the right to recover may rest on either ground stated. Since the premium was to be paid out of the earnings of a particular month, in the absence of an agreement fixing a definite time for the payment, a delay of three days after the end of the month would not be an unreasonable delay, and, since the assured was killed before the end of such third day, there could be no default in the payment at the time of his death.

The appellant contends further that the assured was in default if his earnings for the month of November in the hands of his agent at the time of his death were not sufficient to pay the premium for that month, and he argues that the evidence shows that such earnings were insufficient. But we have adverted to the evidence and findings in this respect, and have reached a contrary conclusion therefrom than that reached by the appellant.

The judgment is affirmed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8330. Department One. April 29, 1910.]

CLARA WOLFE, *Appellant*, v. SCHOOL DISTRICT No. 2 OF COLUMBIA COUNTY, *Respondent*.[1]

SCHOOLS AND SCHOOL DISTRICTS—CONTRACTS—LIMIT OF INDEBTEDNESS—EMPLOYMENT OF TEACHER. Under Laws 1893, p. 266, § 3, the contract of a school district with a school teacher to teach school for a period of eight months is void, when the limit of indebtedness contracted in any one year payable out of the general fund had been reached and exceeded in the aggregate the amount apportioned for the district, as provided in said section.

SAME—LIMIT OF INDEBTEDNESS—NECESSARY EXPENSES. The maintaining of a school for a period of eight months is not such a necessity as to render valid a teacher's contract therefor when the indebtedness incurred exceeded the limit authorized by law.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered January 21, 1909, upon findings in favor of the defendant, after a trial upon stipulated facts before the court without a jury, in an action on contract. Affirmed.

Troy & Sturdevant, for appellant.

Will H. Fouts, for respondent.

FULLERTON, J.—On July 12, 1894, at a regular meeting of the board of directors of School District No. 2, Columbia county, the appellant was elected to the position of principal of the high school of that district to serve for a term of eight months, beginning October 1, 1894, at a salary of $50 per month. After being informed of her election by the clerk of the school district, she sent a formal letter to that officer accepting the position. No written contract was entered into such as the school law seems to have contemplated, but the appellant took up her duties at the commencement of the school year and performed them for a period of three

[1]Reported in 108 Pac. 442.

months, when she was discharged by the school directors. It is agreed that the appellant was duly qualified to teach under the laws of the state, and that her discharge was not because of any fault of her own, but on account of the district's financial condition, the directors having found it necessary, in order to continue the school, to retrench in their expenditures. After her discharge, the appellant in good faith sought employment elsewhere, and, failing to find it, brought this action against the district to recover as damages for a breach of the contract a sum equal to the salary for the unexpired term.

To a complaint setting out the foregoing facts, the respondent answered by way of denials and affirmative defenses, the second of the affirmative defenses being the following:

"(2) For a further and separate defense the defendant alleges: First: That at the time said alleged contract was entered into by plaintiff and defendant the board of directors of defendant had incurred indebtedness against said School District No. 2, the defendant herein, which said indebtedness had been contracted during the year in which said alleged contract was made, and was payable out of the general fund of said district, the defendant herein, and was in a sum exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes became delinquent prior thereto, and said indebtedness had not been authorized by a vote of the electors of said district, and there was no money in the treasury of said school district at said time."

At the trial the principal facts were stipulated; it being stipulated, among other things, that the facts stated in the foregoing separate defense were true. The court entered judgment for the respondent, and this appeal is taken therefrom.

The statute in force at the time the appellant was hired as a teacher, relating to the powers of school directors to enter into a contract when the effect of the contract was to create an indebtedness, reads as follows:

"It shall be unlawful for any board of directors to contract indebtedness against their district in any one year, payable out of the general fund of said district, in any sum or sums exceeding in the aggregate the amount apportioned to said district at the last quarterly apportionment next following the date on which taxes become delinquent, unless said indebtedness be first authorized by a vote of the electors of said district." Laws 1893, p. 266, ch. 109, § 3.

This statute clearly forbids the board of directors of any school district to contract an indebtedness against their district in excess of a sum equal to the last quarterly apportionment next following the date on which taxes become delinquent, and, just as clearly, renders void any contract creating an indebtedness after that limitation is reached. The stipulation entered into between the parties covering the second separate defense above quoted brings the appellant's contract within the rule. It is void because made at a time when the school district was incapable of entering into a valid contract of its nature.

The appellant relies upon the case of *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407, in support of the validity of the contract. In that case we held that liabilities incurred by counties necessary to the maintenance of county government were not within the purview of the constitutional provision forbidding the incurrence of an indebtedness beyond a fixed limit. But this principle is not applicable to the case at bar. The maintenance of a public school throughout a school year of eight months is not such a necessity as to warrant school directors in overriding statutory and constitutional limitations as to the amount of indebtedness a school district may lawfully incur.

The court rested its decision in part on other grounds, but we shall not notice them, as we think the judgment may well rest on the ground that the contract was void as in violation of the statute cited.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8438. Department One. April 29, 1910.]

ALBERT O'CONNOR, *Appellant*, v. R. C. FORCE, *Administrator, Respondent.*

J. P. PAULSON, *Appellant*, v. R. C. FORCE, *Administrator, Respondent.*[1]

APPEAL—RIGHT TO APPEAL—PROCEEDINGS—CONSOLIDATED ACTIONS. A single appeal from one judgment entered in actions consolidated for trial may be taken by appellants jointly affected by the judgment.

TRIAL—PROVINCE OF COURT AND JURY—PRIMA FACIE CASE—JUDGMENT NOTWITHSTANDING VERDICT. Where, on a former appeal, a nonsuit is reversed because the evidence made out a *prima facie* case for the jury, it is error on a retrial, after refusing a nonsuit because the evidence was substantially the same as on the former trial, for the trial court to grant a judgment for the defendant notwithstanding a verdict for the plaintiffs; his power being limited to the granting of a new trial if the verdict amounted to a miscarriage of justice.

APPEAL AND ERROR—DECISION—REMAND—NEW TRIAL. Where, after a verdict for the plaintiffs, defendant moved for a new trial and also for a judgment notwithstanding the verdict, and the latter motion was erroneously granted, the supreme court, on reversing the case, will remand it with directions to give the defendant the benefit of his motion for a new trial, since he is entitled to have the same acted upon.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 2, 1909, in favor of the defendant notwithstanding the verdict of a jury rendered in favor of the plaintiffs, in consolidated actions on contract. Reversed.

Alexander & Bundy and *Cooley & Horan*, for appellants.

Richard Saxe Jones, for respondent.

FULLERTON, J.—These actions were begun separately, sometime in the year 1901, against one Sol G. Simpson, to recover for services performed by the respective plaintiffs in

[1]Reported in 108 Pac. 454; 109 Pac. 1014.

doing assessment work on certain mining claims situated in Alaska. They were first tried in 1904, and resulted in judgments of nonsuit at the conclusion of the plaintiffs' evidence, the court holding the evidence insufficient to put the defendant on his proofs. An appeal was taken from one of the judgments, and a stipulation entered into between counsel that the other should abide the result. The judgment appealed from was reversed by this court and remanded for a new trial. *O'Connor v. Simpson*, 37 Wash. 625, 79 Pac. 1102. Pursuant to the stipulation, the other case was reinstated. In the meantime Sol G. Simpson died, and R. C. Force, administrator of his estate, was substituted as defendant in his stead. The cases were thereupon consolidated for the purposes of this trial, by the agreement of counsel, and tried as one case before a jury. The jury returned a verdict in favor of each of the plaintiffs for $542.52. The defendant thereupon moved for a judgment in his favor notwithstanding the verdict. This motion the court granted, entering a single judgment dismissing the actions with prejudice and allowing the defendant his costs. From the judgment, the plaintiffs appeal.

The respondent moves to strike the transcript and statement of facts and dismiss the appeal, on the ground that it is an attempt to bring into the court two separate actions by one appeal in a manner not authorized by the statutes relating to appeals. But without following the argument of the respondent, we do not think the motion well taken. The actions were consolidated for trial, and the respondent contented himself with one judgment entered in the consolidated action, and we think the appellants were well within the statute when they appealed therefrom as a single judgment affecting them jointly. *First Nat. Bank v. Fowler*, 51 Wash. 638, 99 Pac. 1034.

On the merits of the controversy, we think the trial court was in error in granting a judgment notwithstanding the verdict. It is conceded by both the trial judge and counsel

for the respondent that the evidence on the part of the appellants is substantially the same as it was in the former trial, which this court held was sufficient to make a *prima facie* case in their favor. Indeed, so far was the trial judge impressed with this belief that he overruled a motion for nonsuit made by respondent at the close of the plaintiffs' case in chief, stating, as grounds for his ruling, that the evidence was substantially the same as it was at the former hearing. And, again, when the motion was renewed at the close of all the evidence, he made a similar ruling, using this language:

"The court is not called upon at this time to pass upon the weight of the evidence. A prima facie case has been submitted and it is the duty of the court to submit the issue in the first instance, at least, to the determination of the jury. The supreme court, as far as I can see, has held that the proof in the former case which is also before the court on this trial was sufficient to submit it to the jury. . . . It is the province of the jury to pass upon any issue of facts tendered by the pleadings. The supreme court says the issue was proven prima facie by the evidence of the plaintiffs on the former trial and there ought to be a final conclusion of this matter. If I should change in my ruling now it would mean that it would go up to the supreme court and come back for another trial. I will submit the case to the jury."

Our own examination of the records convinces us that the testimony is substantially the same as it was in the former trial. We are still satisfied, also, that the appellants by their evidence made a *prima facie* case. This being so, the trial judge should not have denied them the right of trial by jury on mere contradictory evidence, no matter what his own conclusions may have been as to the weight of the evidence. If in his belief the evidence against the plaintiffs was so far overwhelming as to cause him to feel that the verdict of the jury amounted to a miscarriage of justice, it was his province to set the verdict aside and submit the question to a second jury, but he had no right to take the burden of deciding the facts upon himself. The right of trial by jury is a constitutional right, and is not to be denied a

litigant who insists upon it and complies with the statutes relating thereto. In this instance, since no new trial was asked for, it was the duty of the court to enter judgment in favor of plaintiffs on the verdicts.

The judgment appealed from will therefore be reversed, and the cause remanded with instructions to enter judgments in favor of plaintiffs upon the verdicts.

RUDKIN, C. J., and GOSE, J., concur.

ON PETITION FOR REHEARING.

[Decided June 30, 1910.]

FULLERTON, J.—Judgments on the verdicts were directed by us at the former hearing of these causes in the belief on our part that no new trial had been asked for by the respondent. By a supplemental transcript, filed by leave of court, it is made to appear that we were mistaken in this regard, and that in fact such a motion was filed which was not ruled upon by the trial court. This fact requires a modification of our former order. The respondent would have been entitled to insist upon his motion for a new trial, and to have the ruling of the trial court thereon, had the court overruled his motion for judgment notwithstanding the verdicts instead of granting it, and he should not be denied this right, since we do not permit the order of the court to stand. In other words, the respondent is entitled now to the same right he would have been entitled had the trial court entered the proper judgment on the motion.

The direction heretofore given as to the form of the judgment will be recalled and the clerk directed to enter an order reversing the judgment appealed from, and remanding the cause with instructions to the trial court to take such further proceedings therein as in its opinion the justice of the case requires.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 8503. Department One. April 29, 1910.]

R. W. SHAW, *Appellant*, v. ROSA LOBE, *as Executrix etc., Respondent*.[1]

ACCOUNT STATED—ASSENT—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show an account stated between partners, where it appears that, on dissolution of the firm, the partner who kept the books made out a statement showing a certain balance due in his favor, that the same was delivered to the other partner, and found among his effects upon his death, and that he had the same checked over by the new bookkeeper and disputed certain items; since no assent or definite acknowledgment of the debt was shown.

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. In an action against an estate by a former partner of the deceased, plaintiff is disqualified from testifying as to any transactions had with the deceased.

PARTNERSHIP—ACCOUNTING—EVIDENCE—SUFFICIENCY. The books of a partnership are insufficient to show a balance due one partner, where unexplained they are so far incomplete as to fail to show the terms of the partnership or its status at the time of the dissolution, and there is no competent evidence to explain them.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. It is harmless error to refuse to admit evidence where, regardless of the evidence offered, there was not sufficient testimony to support a finding for the appellant.

Appeal from a judgment of the superior court for King county, Main, J., entered May 17, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on an account. Affirmed.

G. Ward Kemp, for appellant.

Richard Saxe Jones, for respondent.

FULLERTON, J.—The appellant, as the assignee of one Lee D. Gilmer, brought this action against the respondent to recover a balance claimed to be due on an account stated between Gilmer and E. Lobe, the devisor of the respondent. The

[1]Reported in 108 Pac. 450.

complaint carried a prayer in the alternative for a partnership accounting in case the court should fail to find the existence of an account stated. After issue had been joined a trial was had before the court without a jury, which resulted in a judgment in favor of the respondent. This appeal is taken therefrom.

Two principal questions are presented, the first of which is that the court erred in failing to find an account stated between Gilmer and Lobe. The record discloses that these persons were partners from December 1901 until March 1905, engaged in the insurance, real estate, mining, and loan business, and the business of selling oil on commissions. They were not equal partners. Gilmer by writing, executed June 24, 1902, expressly waived any interest in the real estate and mining business done by the firm, and it seems to have been orally understood that the commissions received from the insurance business was to be divided on a basis of two-thirds and one-third, the larger proportion to go to the partner at whose solicitation the insurance was procured. The active work of the partnership was done by Lobe, while Gilmer did the office work and kept the books. The firm, as a firm, had no joint bank account. All money received belonging to the firm was turned over to Lobe, who deposited it in his own name and drew checks thereon from time to time as the exigencies of the business required.

On the dissolution of the partnership, Gilmer made out a statement from the books by which he showed a balance in his favor of some $2,986.51. The statement contained an account of the receipts of the firm during the time of the partnership from the various businesses in which it was engaged, the proportionate share thereof claimed by Gilmer, and the balance after deducting certain losses of the firm, and the sums withdrawn by Gilmer on his personal account. No deduction was made for rents or operating expenses, although the books show that the latter amounted to a considerable sum. This statement was delivered to Lobe, who

afterwards paid Gilmer in installments the sum of $1,150, the last payment being made on May 26, 1906. After the statement was received by Lobe, he had it checked over by the bookkeeper who succeeded Gilmer, and that person testifies that he disputed a number of the items going to make up the account. The statement was found after Lobe's death among his effects, and it is this statement that the appellant contends constituted an account stated between Gilmer and Lobe, but manifestly the evidence was insufficient to make it such. To impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to another does not show an account stated. There must be some form of assent to the account, that is, a definite acknowledgment of an indebtedness in a certain sum. 1 Enc. L. & P. 688-693. True, assent may be implied from the circumstances and acts of the parties, but it must appear in some form. We are unable to find that there was such an agreement shown by the record here.

On the question whether the evidence shows a balance in the appellant's favor, disregarding the account stated, the record is not so satisfactory, still we think it justifies the conclusion of the trial court. Since Gilmer was a party in interest he was disqualified from testifying (Rem. & Bal. Code, § 1211), and the only evidence pertinent to the inquiry was the books of the partnership. These the court found were kept by Gilmer, and were so far incomplete as to fail in themselves to show the terms of the partnership or its status at the time of its dissolution, particularly whether or not there was a balance owing at that time from the deceased partner to Gilmer. Our own investigation of the books convinces us that no different conclusion could be reached without at least much explanation on the part of some one who was familiar with the partnership business. The record, however, fails to dis-

close any one having the requisite information to make this explanation other than the surviving partner, and since he is disqualified from testifying, the case must fail for want of proofs.

The appellant complains that the court erred in excluding certain testimony offered by him in the course of the trial, particularly in excluding the statement on which he based his claim of an account stated, and testimony of an expert who had examined the books and stated that he could testify as to certain balances shown by them. But while we think the court could have properly admitted the testimony, its refusal to do so was not error requiring reversal. The statement tended to support the appellant's allegation of an account stated, but with it in the record we still think the evidence insufficient to establish the fact. The evidence of the expert could but show what appeared in the books. This would not help the appellant's case. It is what the books fail to show that makes it impossible to determine the status of the partnership, and this could not be supplied by the testimony of the witness. While his evidence might have saved us some labor, we are unable to see how it could change the result.

The judgment appealed from will stand affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8492. Department One. May 2, 1910.]

R. J. Menz Lumber Company, *Appellant*, v. E. J. McNeeley & Company, *Respondent*.[1]

Sales—Delivery—"F. O. B." An accepted order for shingles "f. o. b. cars" means that the seller shall do all that is necessary to load the cars, including the securing of the cars, especially in view of the universal usage in this state.

Contracts—Writing—Construction—Province of Court. Where an order and acceptance is in writing and not ambiguous, it is for the court to construe it, and it is error to instruct the jury that they are to determine what the contract was.

Contracts—Construction—Printed Headings. Printed matter on letter heads not referred to either in an order for the sale of goods or in the acceptance is not a part of the contract.

Custom and Usage—Evidence—To Vary Writing—Sales. Parol evidence of a general or special custom in the shingle trade that accepted orders were contingent upon the exigencies of transportation and expired where delivery was unavoidably delayed for a reasonable time, is inadmissible to vary or control the terms of an unconditional written acceptance, as the same would be repugnant to the contract.

Sales—Action for Breach—Defenses—Failure to Deliver—Excuses. In an action to recover for breach of a contract to deliver shingles, no specific date for delivery having been agreed upon, the defense that washouts, mountain snows and slides prevented a delivery within a reasonable time is unavailable, where the plaintiff was not complaining of a failure to deliver while such conditions existed.

Same—Damages—Assessment. Upon breach of a contract to deliver carload lots, the size of the car not being specified, damages are assessable on the basis of an average sized car.

Same—Breach—Measure of Damages. The measure of the buyer's damages for breach of a contract for the sale of shingles, no definite time for delivery being fixed, is the difference between the contract price and the value of the shingles at the date of the demand and refusal to perform the contract.

Chadwick, J., dissents.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 27, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

[1]Reported in 108 Pac. 621.

Shank & Smith, for appellant.

F. A. Huffer, for respondent.

Gose, J.—The appellant, the plaintiff below, commenced this action against the respondent to recover damages for failure to deliver four carloads of shingles and mixed lumber and shingles. The case was tried to a jury, which returned a verdict for the respondent. From a judgment of dismissal entered upon the verdict, the plaintiff has appealed.

The complaint states four causes of action based upon four separate orders. In the third cause of action, which is illustrative of the others except as hereafter noted, it is alleged, in substance, that the appellant and the respondent entered into a contract of purchase and sale as evidenced by an order and the reply thereto, which, omitting immaterial parts, is as follows:

"Seattle, Wash., Jan. 17, 1907.
"E. J. McNeeley & Co., Tacoma, Wash.
"Order No. 729X

(For conditions upon which this order is accepted see other side of this sheet.)

"Cars to be consigned from R. J. Menz Lumber Co.
(Always show us as Shippers.)

Bill of lading to read

Ship to R. J. Menz Lumber Co. at Minnesota Trft., Minn.
Route N. P.
Prices F. O. B. Mill.

"Terms 90 per cent. advance. Settlement on receipt of consignee's Report and Expense Bill (less usual 2 per cent. discount.) All underweights to mill 50 cent rate. Price Guaranteed.

"Quantity: One (1) Car.

Description.	Price per M.	Guaranteed Weight per M.
6-2 Plain Dimension R. C. Shingles at Any sized—large preferred	$2.50	160

"Please acknowledge acceptance of this order on enclosed postal card, by return mail. Very truly yours,
"R. J. Menz Lumber Co.
"Per E. B. Day."

"Tacoma, Wash., Jan. 18, 1907.
"R. J. Menz Lumber Co., Seattle, Wash.
"Dear Sirs: Your order No. 729X has been received. We accept and enter same for shipment in accordance with the terms thereon. We anticipate making shipment on or about ..... At prices annexed, we would like to move the following stock:.....
"Yours very truly,
"E. J. McNeeley & Company,
"Per ....."

The order in the first cause of action is for fifty thousand described shingles, with directions to "Fill car 6-2 Ex. *A. *R. C. Shingles." The order in the second cause of action is for seventy-five thousand designated shingles, with directions: "Balance 6-2 extra. *A. *R. C. Shgls." And "Small car preferred." Shipping directions in the fourth cause of action were: "Ship to order of Bonds Foster Lumber Company at Aurora, Nebraska. How ship: Billings care B. & M. R. When: Soon as possible. Terms: Regular f. o. b., Aurora, Nebraska. Sixty cent rate." This cause of action was assigned to the appellant. Each of the acceptances, except on the third cause of action, was upon the respondent's stationery which had printed thereon, above the typewritten acceptance, the name of the respondent, illustration of shingles, capacity of its mills, specialties, etc., including the words: "Quotation subject to change without notice. Contracts made at home office only and contingent upon exigencies of transportation and accidents beyond our control." Similar typewritten matter was upon the letter heads of the appellant.

The respondent interposed three affirmative defenses to each cause of action except the third, which in substance are,

(1) that it accepted the order by letter upon its letter head which contained the printed matter just quoted; that at the time of the acceptance of the order and continuing until April 5, 1907, there was a great shortage of railroad cars in the state of Washington and in the country generally for use in transporting lumber and shingles, and that cars could not be procured for such purposes except in limited numbers inadequate for the handling of the lumber and shingle business of the state and of the country generally; that by reason thereof manufacturers and sellers of such commodities were unable to procure cars, which facts were at all times known to the appellant; that between January 26 and April 5, 1907, by reason of storms, washouts, and other acts of God preventing railway companies operating in this and other lumber producing states, railroads could not furnish any cars for transporting lumber and shingles; that the car embargo could not have been foreseen; that on account thereof the market price of lumber and shingles appreciated; (2) that there was a general custom, and a special one between the appellant and the respondent, that such contracts were contingent upon the exigencies of transportation and accidents beyond the control of the parties; that when delivery of such commodities has been delayed until a reasonable time has expired in which to make delivery, without fault on the part of the seller, and where delivery would inflict a loss upon either of the parties, compliance with the contract is excused; that this custom was well known to the parties and the contract was made with reference thereto (the car embargo and the rise in the price of lumber and shingles is alleged as in the first defense); (3) that there is a particular custom in the lumber trade known to the appellant, and in giving or accepting an order, the parties contracted in reference thereto; that all orders in writing are accepted contingent upon the exigencies of transportation and accidents beyond the control of the parties. The shortage of cars and the rise in the price of lumber is alleged as in the

first defense. The first affirmative defense is omitted as to the third cause of action, the acceptance there being on a postcard not containing the printed matter on the respondent's letter head. The failure of respondent to deliver the material is admitted, and it seeks to excuse performance in the manner pleaded.

It now asserts, however, that it was the duty of the purchaser to furnish the cars for loading, and that failing to do so there can be no recovery. Notwithstanding the fact that this view is inconsistent with the claim that the acceptance of the order was subject to the exigencies of transportation, we will consider it, as it may arise upon a retrial of the cause. Where the contract is otherwise silent as to who shall furnish the cars, the term "f. o. b. cars," as applied to ordinary commercial commodities, means that the goods shall be free on board the cars—that is, loaded without expense to the purchaser, and that the seller shall procure and load them. *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 85 Pac. 551, 117 Am. St. 525, 6 L. R. A. (N. S.) 928; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 106 Am. St. 989, 67 L. R. A. 756; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Elliott v. Howison*, 146 Ala. 568, 40 South. 1018.

In the *Hurst* case, at page 429, it is said:

"It is our understanding that the phrase or formula 'f. o. b. cars' has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning, generally understood by all business people. When such phrase or formula is used in a business contract, between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will, at his own expense, do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the placing of cars upon which to load the commodities sold; and when nothing appears to modify or limit this meaning the courts should enforce the contract so as to effectuate this intent. This rule is reasonable; it harmonizes with existing

business conditions, and is the universal practice among business people. It is conceded that by this phrase the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an understanding the contract would be incomplete and unenforceable. What the parties intended upon this subject can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions, must be considered."

In the *Vogt* case, discussing the meaning of the phrase at page 499, the court said:

"Whether such meaning includes, under the circumstances of this case, the duty of the seller to procure the cars in place for his use in loading the merchandise, and evidence is not permissible to show the existence of a custom which the parties contract with reference thereto, is not altogether plain, but we are constrained to hold that it does."

In the *Elliott* case, at page 591, it is said:

"In the case at bar the seller undertook to accomplish the delivery of the things sold free on board the cars. We think it comports with reason to hold that by necessary implication he agreed to supply all means to accomplish such result—the cars upon which the shipments of piles were to be made."

The authorities cited by the respondent, holding that the term implies that the buyer shall procure the cars, are discussed, distinguished, and disapproved in the case of *Hurst v. Altamont Mfg. Co.*, *supra*. It must, however, be conceded that there is a conflict of authority on this question, but we think, not only that the rule we have stated is a correct interpretation of the phrase, but that universal usage in this state has given it the meaning which the language imports. The language, however, in this case, "We accept and enter

same for shipment. . . . We anticipate making shipment," cannot be given any other rational meaning.

The court instructed the jury, in substance, that they should determine from all the evidence what the contract was; that in so doing is was proper for them to consider whether the printed matter on the letter heads forms a part of the contract; that ordinarily such matter, if not repugnant to the contents of the letter itself, may be considered as a part of the contract if the parties make their contract with reference thereto and knowledge thereof. This instruction was erroneous. The order and the acceptance were in writing and constituted the contract, and it was the duty of the court to construe them, if not ambiguous; and if ambiguous, to receive parol testimony to explain the ambiguities. The printed matter on the letter heads was not referred to in either the order or the acceptance, and is not a part of the contract. 2 Page, Contracts, § 600; *Sturm v. Boker*, 150 U. S. 312; *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. 872. In the *Sturm* case the court said that a printed bill head could not control, modify, or alter the terms of the contract, and that "the contract being clearly expressed in writing, the printed bill-head of the invoice can, upon no well-settled rule, control, modify, or alter it." In the *Summers* case, at pages 108, 109, the court, in considering the precise question, said:

"The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words, 'All sales subject to strikes and accidents,' no more made those words a part of the contract than they made the words there printed, 'Summers Bros. & Co., Manufacturers of Box-annealed Common and Refined Sheet-Iron,' a part of the contract. The offer was absolute. The written acceptance, which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face, a conditional one by reference to a letter head which was not referred to by either parties. The language of the acceptance, "We accept and enter same for shipment in accordance with the terms thereof," is clear and its meaning plain. The respondent agreed to ship the goods according to the terms of the order, not according to the terms of the printing on the letter heads. The respondent has cited *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654, and *Delta & Pine Land Co. v. Wallace*, 83 Miss. 656, 36 South. 263. In the *Yorston* case the order on which the plaintiff relied for a recovery specially referred to the printed head lines on the order, and the contract was made by reference thereto. The court ruled that it was competent for the defendant to refer thereto on the blank furnished him by the plaintiff for his use in making the order. In the *Delta* case it was held that written and printed matter in a contract will be reconciled when it can be done.

The court instructed the jury that, in determining whether there had been a breach of the contract, they should consider whether there was a general custom which formed a part of the contract; whether it was the custom of the respondent to accept such orders only upon the conditions expressed in its letter heads, which was brought to the knowledge of the appellant so that it made the contract in view of the provision and adopted it as a part of the contract; that they should determine when the contract expired, whether in a reasonable time if the parties were unable to fill it so that it was cancelled and no longer obligatory, and if so, there could be no recovery. This instruction the appellant contends was erroneous. We think it was clearly so. Parol testimony of usage or custom, either general in the community or special between the people engaged in a particular trade or business, is not admissible to vary, modify, or control the terms of the contract. *Williams v. Ninemire*, 23 Wash.

393, 63 Pac. 534; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Commercial Bank of Tacoma v. Hart*, 10 Wash. 303, 38 Pac. 1114; *City of Covington v. Kanawha Coal & Coke Co.*, 121 Ky. 681, 89 S. W. 1126, 123 Am. St. 219, 3 L. R. A. (N. S.) 243; *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672; *Partridge v. Phoenix Mut. Life Ins. Co.*, 15 Wall. 573; *Barnard v. Kellogg*, 10 Wall. 383; *Mercantile Banking Co. v. Landa* (Tex. Civ. App.) 33 S. W. 681; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826; *McMillan v. American Express Co.*, 123 Iowa 236, 98 N. W. 629; *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. 107.

In the *Covington* case, at page 686, it is said:

"But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification; that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written."

In the *Sheffield Furnace Co.* case the contract provided for a sale of coke at a price "f. o. b. cars, Sheffield, Alabama." Sheffield was the point of destination of the coke. The court held that evidence of a general custom in the coke trade was inadmissible for the purpose of showing that the purchaser should advance the freight. In *Barnard v. Kellogg* it was held that usage cannot be allowed to subvert the settled rules of law or defeat the essential terms of the contract; that its office is to explain words or phrases of doubtful meaning, or which may be understood in different senses according to the subject-matter to which they are applicable. In the *Partridge* case the plaintiff, having been discharged from the employment of the defendant, sought to recover for services rendered as agent, and asserted a right to a commission on the annual premiums paid, or to be paid, on policies issued through his agency. To establish this he undertook to prove a usage between insurance companies and their agents. He introduced in evidence a letter of the

company in reply to one asking information as to the relation he sustained to the company, which stated: "Concerning your status in Missouri, it is simply this: You are working up a business for yourself, and are paid the highest commissions which we pay." At page 579, the court, speaking through Mr. Justice Miller, said:

"It appears to us, as it did to the circuit court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time."

And that:

"No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts."

The respondent has cited, in support of this construction, *Bliven v. New England Screw Co.*, 23 How. 420; *Robinson v. United States*, 13 Wall. 363, and *Lillard v. Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168. These cases recognize the rule which we have stated, but hold that it is inapplicable to the particular facts before the court. The *Bliven* case, in its application of this principle of law to the facts before it, tends to support the instruction. But as we read the *Robinson* and the *Lillard* cases, the facts are so different that they are not pertinent to the issue. In the *Robinson* case a contractor had agreed to deliver a million bushels of barley to the government between certain dates, but the contract did not specify the manner of delivery. After making certain deliveries in the sack, a large quantity was tendered loose in wagons. The tender being refused, it was held in a suit by the government that, the contract being silent as to the mode of delivery and there being two modes

essentially different, evidence of the customary mode of delivery was admissible. In the *Lillard* case it was held that, where a distiller had contracted to deliver the total product of slop at a "feeding lot" supplied by him, the contract not expressing the mode of delivery, evidence of custom was admissible to show how a delivery was to be made. In the case at bar it seems to us that the instruction of the court permitted the jury to find a contract wholly different from that made by the parties. The acceptance of the order was unconditional. The time of delivery not being stated, the law would require a delivery within a reasonable time. The instruction permitted the jury to transform an unconditional acceptance into a conditional one, which made the delivery subject to the exigencies of transportation and subject to the further condition that, if the goods could not be shipped within a reasonable time, the contract was no longer obligatory upon either party. This was clearly repugnant to the contract.

A contract definite in its terms cannot be made subject to a custom of trade that, if it cannot be performed in a reasonable time, it need not be performed at all. There is a principle of law that, in contracts where the performance depends on the continued existence of a specified person, animal, or thing, a condition is implied that the impossibility of performance arising from the death of the person or animal or the destruction of the thing, excuses the performance. This principle has no application to this case. The acceptance required a delivery within a reasonable time. In determining what was a reasonable time, the circumstances of the difficulty or impossibility of getting cars up to April 2, 1907, the date when the car embargo was removed, should be considered. One of the defenses is that there was a great shortage of cars when the contract was made, and that the appellant had knowledge of that fact. If this is true, it would be a circumstance in determining what a reasonable time would be. The fact that the contract called for ship-

ment through the mountains in the winter season would be another circumstance to be considered. We are not dealing with a contract where a fixed date of shipment or delivery was agreed upon. The appellant, however, is not complaining because a delivery was not made during this period, but because of the refusal of the respondent to deliver within a reasonable time after transportation of lumber and shingles was resumed. The question of whether the washouts, deep mountain snows, and slides, preventing transportation for a given period, were the acts of God need not be considered because, as we have stated, the appellant is not complaining on account of a failure to deliver while these conditions obtained. 2 Page, Contracts, §§ 1375, 1377; *Buffalo & L. Land Co. v. Bellevue Land & Imp. Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; 9 Cyc. 627; *Summers v. Hibbard etc. Co., supra; Jones v. Anderson*, 82 Ala. 302, 2 South. 911; *Fleishman v. Meyer*, 46 Ore. 267, 80 Pac. 209; *Eugster & Co. v. West & Co.*, 35 La. Ann. 119, 48 Am. Rep. 232.

The respondent contends that, if it could not ship within a reasonable time owing to lack of cars, it was excused from shipping at all, and cites: *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215, 220, and *Raisin Fertilizer Co. v. Barrow*, 97 Ala. 694, 12 South. 388. In the *Stewart* case a manufacturer of butter and cheese agreed with certain individuals to convert their milk into cheese and butter, sell the products, and divide the proceeds according to the contract. The factory was destroyed by fire and a quantity of milk, butter and cheese was lost. The court recognized the exception that we have noticed, and held that the destruction of the factory, if it occurred without negligence on the part of the owner, relieved it of liability for damages. In the *Raisin Fertilizer Co.* case the engagement to deliver was conditional upon "water transportation" permitting.

Where the order does not specify the size of the car, the damages are assessable on the basis of an average sized car used in shipping such commodities. *Floyd v. Mann*, 146

Mich. 356, 109 N. W. 679; *Bullock v. Finley*, 28 Fed. 514. Under the circumstances of the case, the measure of damages is the difference between the contract price and the value of the commodities at the date of the demand and refusal to perform the contract. *Summers v. Hibbard etc. Co., supra; Roberts v. Benjamin*, 124 U. S. 64; *Brown v. Sharkey*, 93 Iowa 157, 61 N. W. 364; *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087; *United R. & Elec. Co. v. Wehr & Co.*, 103 Md. 323, 63 Atl. 475.

The instructions requested by the appellant state the law of the case applicable to the issue, and should have been given as an entirety. The length of this opinion forbids a statement of their substance, but it is sufficient to say that they were in harmony with the view we have taken of the case.

The judgment will be reversed, with directions to proceed in conformity with this opinion.

RUDKIN, C. J., FULLERTON, and MORRIS, JJ., concur.

CHADWICK, J., dissents.

[No. 8462. Department Two. May 2, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. A. F. SMITH *et al.*, *Appellants*.[1]

GAMING—PLAYING GAME—STATUTES—CONSTRUCTION. Playing at a game of poker, without having any interest in the place or conducting the game, warrants a conviction under Rem. & Bal. Code, § 2924, providing that each person who "shall deal, (play), or carry on . . . conduct . . ." etc., shall be guilty, etc., the word "play" being part of the original law as enacted in 1881.

GAMING—VERDICT—FORM—SUFFICIENCY. Where an information charged but one offense, the misdemeanor of playing, opening or conducting the game of poker as defined by Rem. & Bal. Code, § 2924, a verdict of "guilty of conducting a game of poker" is sufficient, although by Id., § 2172, the form of "guilty" or "not guilty" is contemplated.

[1]Reported in 108 Pac. 618.

SAME—VERDICT—SUFFICIENCY—OFFENSE CHARGED — INSTRUCTIONS. Upon an information charging only the misdemeanor of playing or conducting a game of poker, defined by Rem. & Bal. Code, § 2924, in which the court erroneously assumed that it charged the felony of keeping a gambling place as "owners, proprietors," etc., and so charged the jury, submitting three forms of verdict, a verdict in the form instructed for the misdemeanor, showing that the jury clearly intended to find the defendants guilty under § 2924, is sufficient to sustain a conviction of the misdemeanor, although technically defective.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered May 27, 1909, upon a trial and conviction of gambling. Affirmed.

Henry J. Snively and *H. B. Noland*, for appellants.

A. A. Hinman, for respondent.

PARKER, J.—The defendants were charged by information as follows:

"That the said A. F. Smith, C. Griffith, F. T. Allison and John Lewis, in the County of Franklin, State of Washington, on the 21st day of February, 1909, then and there being, did and then and there willfully, unlawfully and feloniously conduct, deal, play and carry on a certain game of poker, the same having been played and operated for checks then and there being representatives of value, to wit: Representatives of money, and that said game was played, carried on and conducted in a certain room of a certain building known as 'Sylvester's Pool Room,' in the town of Pasco, the same being a place where persons then and there resorted for the purpose of playing said game."

They each pleaded not guilty, and upon a trial before the court and a jury, were found guilty. They moved for a new trial, and also for arrest of judgment, which motions being denied, judgment was entered upon the verdict, fining each of them $50. From this judgment, the defendants have appealed.

This conviction was had under § 2924 of Rem. & Bal. Code, which provides:

"Each and every person who shall deal, [play], or carry

on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee, whether for hire or not, any game of faro, monte, roulette, rouge-etnoir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor."

The principal contention of learned counsel for appellants is that this conviction cannot be sustained because the evidence shows that the only thing the defendants did was to play at a game; and that this did not constitute an offense under § 2924; it being argued that this law is not aimed at those who only play at the games named, but is aimed at owners and proprietors. We will proceed upon the theory that the appellants had no interest in the place as owners, proprietors or employees, and that they were only playing at a game of poker, and only in that sense did they conduct, deal, play, or carry on such game for checks representing value. Under our previous holdings these facts will sustain a conviction under § 2924. *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817; *State v. Preston*, 49 Wash. 298, 95 Pac. 82.

It is further contended that the word "play" is not in fact in this law, and with that word eliminated there would be nothing left in the law which could be construed as referring to any persons other than owners, proprietors, and employees. Our former decisions seem to assume that the word "play" is a part of the law. *In re Dietrick*, 32 Wash. 471, 474, 73 Pac. 506; *State v. Preston, supra.* However, since this question is presented for the first time, we have given it some attention. The contention that the word "play" is not in the law is apparently prompted by the manner in which it has been printed in Rem. & Bal. Code, and also its omission from § 1253 of the Code of 1881. In the former, it will be noticed, the word appears in brackets, thus suggesting some uncertainty as to its correctly being there. Referring to § 1253 of the original enrolled act of 1881 in

the office of the secretary of state, relating to crimes and punishments, we find the word "play" therein. It is evident that the word is in the law and that its omission from the code of 1881 is an error.

It is contended that the verdict is insufficient upon which to base a judgment; the argument being that the constituent elements of the offense are not covered by the verdict, the verdict being "guilty of conducting a game of poker." It will be noticed that the verdict does not simply find the defendants "guilty," nor does it in terms refer to the offense charged in the information. Either of these forms would no doubt be sufficient, though § 2172 of Rem. & Bal. Code seems to contemplate the using of the words "guilty" or "not guilty" as the case may be, without anything further. Such a verdict would be in proper form in this case, since there is but one offense charged, being that defined by § 2924 of Rem. & Bal. Code.

This record indicates that both the prosecuting attorney and the court regarded this charge as one of felony under chapter 51 of the Laws of 1903, page 63 [Rem. & Bal. Code, § 2931 *et seq.*], including the misdemeanor under § 2924. By our former holdings it is plain that this information does not charge a felony, since it does not charge the defendants as owners, proprietors, or employees; hence, it only charges the misdemeanor defined by § 2924. *State v. Gaasch, supra.* The trial court being of the opinion that the information charged both the felony and misdemeanor, instructed the jury accordingly, and instructed them to return one of three verdicts, furnishing them this with two other forms, at the same time instructing them in such manner as to plainly indicate they should use this form in case they found the defendants guilty under § 2924. In view of the court's instructions, there can be no doubt of the jury's intention to find the defendants guilty of the misdemeanor defined by § 2924, though it is somewhat technically defective. We are of the opinion that the evidence was sufficient

to sustain the verdict, and find no prejudicial error in the record.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8081. *En Banc.* May 3, 1910.]

CARSTENS PACKING COMPANY, *Respondent*, v. SOUTHERN PACIFIC COMPANY, *Appellant*.[1]

CARRIERS—OF LIVE STOCK—CONTRACTS—EXEMPTION FROM LIABILITY—PUBLIC POLICY. A statute providing that a railway carrier of live stock cannot exempt itself from liability for losses or injuries caused by its own negligence is a rule of public policy in this state.

SAME—CONTRACTS—VALIDITY—WHAT LAW GOVERNS. An exemption by contract from liability for negligence by a railroad transporting live stock into this state, contrary to the provisions of Rem. & Bal. Code, § 8648, is void as against public policy, although valid under the laws of the state where the contract was made; and comity does not require its enforcement in this state.

SAME—CLAIMS FOR LOSS—EVIDENCE—ADMISSIBILITY. In an action for injuries to live stock transported by defendant under a contract requiring claims for loss sustained to be made in writing within ten days after unloading the stock, evidence of abnormal shrinkage in weight is admissible without a bill of particulars or specification of the item, where the claim was for loss and damage due to rough handling, bruises, and depreciation in value, and opportunity was given to inspect the stock on arrival at its destination.

SAME—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. The evidence is sufficient to sustain a verdict for loss and damage to cattle transported, through negligent rough handling of the train by the carrier, although the testimony of the shipper's representative accompanying the stock could not be obtained, where there was evidence tending to show the condition of the cattle when shipped, and when delivered, and that a great number were so seriously bruised as to be unsalable.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 20, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action of tort. Affirmed.

[1]Reported in 108 Pac. 613.

Wm. D. Fenton, R. A. Leiter, and *Peters & Powell,* for appellant, contended, among other things, that it is not sufficient to show that the stock arrived at its destination in an injured condition. Hutchinson, Carriers, § 1357; Elliott, Railroads (2d ed.), § 1549; *Terre Haute & L. R. Co. v. Sherwood,* 132 Ind. 129, 31 N. E. 781, 32 Am. St. 239, 17 L. R. A. 339; *St. Louis etc. R. Co. v. Weakly,* 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; *Peterson v. Chicago etc. R. Co.,* 19 S. D. 122, 102 N. W. 595; *St. Louis S. W. R. Co. v. Vaughan* (Tex. Civ. App.), 41 S. W. 415; *Pennsylvania R. Co. v. Raiordon,* 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670. Under the laws of California, the contract was valid. *Donlon Bros. v. Southern Pac. Co.,* 151 Cal. 768, 91 Pac. 603, 11 L. R. A. (N. S.) 811; *Michalitschke Bros. & Co. v. Wells, Fargo & Co.,* 118 Cal. 683, 50 Pac. 847; *Pierce v. Southern Pac. Co.,* 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; *St. Louis & S. F. R. Co. v. Kimberlin* (Tex. Civ. App.), 111 S. W. 671; California Civil Code, §§ 2174-2176. And the laws of California govern. 1 Hutchinson, Carriers, § 199 *et seq. La Selle v. Woolery,* 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Hunter v. Wenatchee Land Co.,* 36 Wash. 541, 79 Pac. 40; *Palmer v. Atchison etc. R. Co.,* 101 Cal. 187, 35 Pac. 630.

Ellis, Fletcher & Evans, for respondent.

PARKER, J.—This was an action to recover for loss and injuries to cattle in four shipments from points in California to Tacoma, in this state. Each shipment was made the basis of a separate cause of action. The loss and injuries occurring in the second, third, and fourth shipments it is alleged were caused by the defendant's negligence in the operation of its trains, and also by its failure to provide reasonably safe unloading facilities at Gazelle, California, where the cattle were unloaded for water, food and rest. The loss and injuries occurring in the first shipment are alleged to be the result of defendant's negligence in the operation of its

trains. The defendant by its answer denied all negligence upon its part, and alleged that the shipments were made under written contracts upon the terms and conditions of which, and not otherwise, it undertook to transport the cattle from the several points in California to Tacoma, setting forth the contracts, containing the following:

"That in no event is first party or its lessors to be liable for any loss of, or damage to, said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which under the terms of this contract, is due from first party to second party as to said live stock."

Defendant also alleged that, under the law of California where the contracts were made, such agreed exemption from liability is permissible, and set forth the sections of the civil code of California showing that such stipulated exemption is valid in that state. The trial resulted in a verdict in favor of the plaintiff upon each cause of action. Judgment was entered thereon, and upon the denial of defendant's motion for a new trial, it appealed to this court.

The learned trial court instructed the jury, in substance, that the defendant could not stipulate against its own negligence, and refused to give instructions requested by appellant's counsel to the effect that it could be held liable for its gross negligence only. This is assigned as error by counsel for appellant, upon which assignment it is contended that, since this contract was executed in California, and the law of California sustains the validity of the provision therein limiting the liability of appellant as against its own negligence, other than gross negligence, the law of California must govern in determining the construction and validity of that part of the contract and the respective rights of the parties thereunder. Of course the general rule is that the law of the place of the making of a contract controls in determining the rights and liabilities of the parties thereto. This rule, it is contended by learned counsel for respondent,

has its exceptions and qualifications, and does not control in this case, because the limitations attempted to be placed upon appellant's liability resulting from its negligence, other than its gross negligence, is in contravention of the public policy of this state, and, therefore, when sought to be enforced in the courts of this state, should be regarded as void, and that appellant's liability for its negligence should be determined regardless of such provision. At the time of the making of the contracts it was a part of the statute law of this state, Laws of 1907, p. 691 [Rem. & Bal. Code, § 8648 *et seq.*],

"That no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting live stock by railway from liability of a common carrier, or carrier of live stock, which would exist had no contract, receipt, rule, or regulation been made or entered into."

It hardly needs argument to demonstrate that this is a declaration of public policy. Clearly, its enactment was prompted by a concern for the public welfare. It is in keeping with the law existing in many of the states of the Union, touching the power of public carriers to limit their liabilities and lessen their duties as such by rule or contract. Upon the question of attempting to so limit their liability against their own negligence, in Moore on Carriers, 313, it is stated:

"The doctrine is established by the great weight of authority in this country that a carrier cannot by stipulation or contract relieve or exempt itself from liability for losses or injuries caused by its own negligence or want of care and skill, or that of its servants, or by its own or their wilful default, misfeasance or tort. Public policy and every consideration of right and justice, it is held, demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing its duty, shall not be taken away by any reservation in its receipt, or by any arrangement, contract or stipulation entered into. Such contracts are, therefore, declared to be void as being unreasonable and contrary to public policy and afford no protection to the carrier."

This court has recently recognized this rule in *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 106 Pac. 487. In view of the importance of the question involved, we deem it appropriate to notice the reasons upon which this doctrine rests. They have been ably stated by Justice Bradley, speaking for the supreme court of the United States, in the case of *Railroad Co. v. Lockwood*, 84 U. S. 357, 378. We quote from that decision at some length, commencing at page 378:

"It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. . . .

"Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. . . .

"If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which

the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contract assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. . . .

"Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable;

to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

It is clear that if this contract had been made within the state of Washington for shipments from and to points within the state, the provisions thereof attempting to limit the liability of the appellant against its negligence would be regarded as void. What then is the effect of such a provision in a contract made in a state where the law regards it as binding upon the parties, when such contract is to be performed, at least in part, in our own state? Must the law of the place of executing the contract control when rights such as here involved are brought in question in our courts? Does the comity which exists between sovereign states compel us to measure the rights of the parties by such a provision even though it violates the public policy in our state? It may be conceded that in many of the states of the Union the law of the state wherein such contracts as here involved are made is held to govern, even though the public policy of the state in which the contract is sought to be enforced is thereby violated. In this state the question is here presented for the first time, and we are therefore not bound by any previous decisions or expressions of our own upon the subject. In solving the problem then, we feel constrained to follow the views of the supreme court of the United States, not only because it is the highest authority in our land, but because those views appeal to our sense of right and are, we think, most in keeping with the spirit of the age. Let us notice some of the decisions of that court.

In the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, a consul general of the Turkish government residing in this

country entered into a contract whereby, in consideration of a certain percentage, he agreed to use his influence in favor of an arms company with his government, to promote a sale of arms by the company to his government; and the sale having been consummated, he sued to recover his percentage. It required but little argument to show that such a contract was against public policy in this country. It is true the contract was made in this country, but it was pointed out that the Turkish government did not object to its officer taking commission on such contract. The court disposed of the case as though that were the fact, and treated the contract somewhat as though it had been made in Turkey. Justice Field, speaking for the court, said at page 277:

"But admitting this to be otherwise, and that the Turkish government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.

"The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents, or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society. 'All such contracts,' he adds, 'even although they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of

international jurisprudence.' Story, Conflict of Laws, § 258."

In the case of *The Kensington*, 183 U. S. 263, the effect of our public policy upon the attempted enforcement of a contract made in a foreign country, similar to the contract here involved, was brought in question. In that case there was involved a loss of baggage of a passenger upon a steamship bound from Antwerp to New York. Among other conditions printed upon the ticket of the passenger, and which formed a part of the contract, it was provided that the shipowner should not be liable for loss of baggage from any act, neglect, or default of the shipowner's servants. This limitation of liability appeared to be valid under the laws of Belgium, where the ticket was purchased and the contract for passage made. Justice White in discussing the effect of such provision, when it was attempted to be invoked as a defense in a suit for the loss of the baggage in a Federal court of this country, commencing at page 268, said:

"It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & Ohio etc. Railway v. Voigt*, 176 U. S. 498, 505, 507, and *Knott v. Botany Mills*, 179 U. S. 69, 71, where the previously adjudged cases are referred to and the principles by them expounded are restated. . . .

"Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and indeed for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the

general rule created by the act of 1893. *Knott v. Botany Mills, supra.* As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Conflict of Laws, Secs. 38, 244. Whilst as said in *Knott v. Botany Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more

potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the states of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offense against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the District Courts of the United States. In *The Guild Hall*, 58 Fed. Rep. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. Rep. 472, the same rule was applied to a bill of lading issued in Germany by a British ship for goods consigned to Philadelphia."

Are not these considerations sufficient to show that no rule of comity requires us to ignore the declared public policy of our state, in order that the terms of a contract made in another state shall be recognized as valid here, simply because such terms are valid where made. Is it not as much our right and duty to withhold the aid of our courts from the enforcement of such a provision as if it were made part of a contract entered into here? Is not the state of Washington as much a sovereign as the nation, as to the matter here involved? We see no more reason for yielding our public policy to the end that this attempted limitation upon appellant's liability may be enforced here than there would be for the highest court of the nation overriding a rule of public policy to the end that a contract made in a foreign country might be enforced here. We are of the opinion that the provisions of these contracts, sought to be invoked as a defense by the appellant, are clearly in violation of the public policy of our state, and should not be recognized as valid here although admitted to be valid and enforceable in the

state where the contracts were made. The action of the learned superior court in giving instructions, and refusing those requested by appellant upon this question, was not erroneous.

The contracts provided, among other things, that claims for loss or damage sustained by the shipper should be made in writing within ten days after unloading the stock, and failure to so make such claim should operate as a waiver and release. Respondent filed four separate claims for damages, one for each shipment. They differ somewhat in their language, but the purport of each was a claim for loss and damage due to rough handling and improper facilities for loading and unloading at Gazelle, California, and that the cattle were badly bruised and depreciated in value. The evidence also shows that appellant was given notice and opportunity to inspect the cattle on arrival at Tacoma.

It is contended on behalf of appellant that the trial court erred in admitting evidence of abnormal shrinkage in the weight of the cattle resulting from their shipment. This contention is based on the alleged want of notice of such claim, as the claims did not mention shrinkage in weight as one of the items going to make up the total amount of the damages claimed. However, these claims gave appellant notice of the cause of the damage so it could by prompt investigation become fully informed relative thereto. We think this was a substantial compliance with the provisions of the contract, especially in view of the notice and opportunity given appellant for inspection upon the arrival of the cattle, and that respondent was entitled to prove any damage which was the natural and probable result of such cause, without furnishing with its claim a bill of particulars showing the items of damage. We think evidence of shrinkage was admissible, conceding, though not deciding, that the question is not controlled by the Law of 1907 above quoted [Rem. & Bal. Code, § 8648 *et seq.*].

It is also contended that the evidence was wholly insufficient

to support respondent's fourth cause of action, which related to the first shipment. There was evidence tending to show that the loss and injuries in connection with this shipment occurred while the cattle were upon the appellant's road. Such fact could be fairly inferred by the jury from the evidence of the condition in which the cattle were delivered to appellant for shipment, and the condition in which they were received at Tacoma, and the evidence tending to show that the injuries did not occur while on the Northern Pacific road between Portland and Tacoma. Witness Belcher testified as to the nature and extent of the injuries to the cattle in this shipment, consisting of five car loads, upon their arrival at Tacoma, as follows:

"Q. Now what was their condition? A. Well, on the first shipment, I don't remember whether it was a cow or steer, one particular animal had the whole loin knocked out; had to be trimmed up on account of being bruised and the others were bruised. The sides were bruised. The hind quarters were badly bruised, indicating that they had been down somewhere and gotten their legs bruised, and they had to be trimmed so that there was practically—part of them practically nothing but their ribs left. No meat on them at all. Q. How extensively? Any number of the cattle on this first shipment that were not bruised more or less? A. They were all bruised more or less. I only took a record of those that were bruised so badly that they could not be turned out or sold as fresh meat; had to be trimmed up. Q. Do you remember how many there were? A. I believe there was 98 in that bunch. Q. That were injured so that they could not be turned out? A. Yes, sir. Q. What do you mean by turned out? A. Sold to our trade just as they stood. Q. And how about the rest of them? A. They were all bruised. They all had bruises on them more or less. I didn't think it worth while to make a note of those that were not bruised badly enough to have to be cut up. Q. Were the rest of them damaged in value to any extent? A. They were. Q. To what extent? A. Well, you would have to average it. The entire shipment I should say was damaged to the extent of about three or four cents a pound at least. Q. That is taking those that were absolutely and entirely damaged and those that were partially

damaged and averaged together? A. Yes, sir. Mr. Powell: Do I understand that you mean to say, Mr. Belcher, testify here that the whole shipment of all the cattle averaging would be a damage of three or four cents? A. I do. Q. Per pound? A. I do. . . . Q. Mr. Belcher, do you know how much from these cattle in the first shipment we are inquiring about, had to be trimmed off and not used at all. A. I think there was about three quarters of the animals that went into the cutting room that had to be turned into fertilizer. Q. Do you mean three fourths of all of the animals? A. No, three fourths of ninety eight. Probably a quarter of the ninety eight was good. Q. A quarter of the 98? A. Yes."

One Pauley, an employee of respondent, accompanied the train which carried the cattle, as the contract provided, but he could not be secured as a witness at the trial, so respondent had to rely upon evidence of the nature above mentioned, not having witnesses with personal knowledge of what occurred to the cattle while in transit. Appellant's counsel argue that where the shipper accompanies the shipment under the contract, the burden is upon him to show that the injuries to the stock were caused by the negligence of the carrier, and not by the stock themselves or the negligence of the shipper, and the proof of the damaged condition in which the stock were received was not sufficient; as it might be in case of a shipment without being accompanied by the shipper.

It may be conceded that ordinarily in such case the shipper must prove something more than the mere damaged condition of the property when received from the carrier, but if the nature and extent of the damages proven is such that the jury may reasonably infer therefrom that it was caused by the rough handling of the carrier's train, it seems to us that such proof would be sufficient to sustain a finding that the damage was caused by the carrier's negligence. The evidence tending to show the nature of the bruises upon the cattle, the great number of them so bruised and injured, their abnormal shrinkage, together with their general condition at the end of the journey, we think was sufficient to

warrant the jury in finding such injuries were the result of appellant's negligence. The evidence in support of the other cause of action is also challenged, but since it is of substantially the same nature as that relating to the first shipment, and has the additional support of testimony of witnesses who accompanied the shipments, it was sufficient to support the verdict.

We are of the opinion that the judgment should be affirmed. It is so ordered.

FULLERTON, GOSE, DUNBAR, CROW, MOUNT, and CHADWICK, JJ., concur.

[No. 8382. Department Two. May 3, 1910.]

W. W. WHIPPLE, *Appellant*, v. D. H. LEE *et al.*, *Respondents*.[1]

APPEAL—DECISIONS REVIEWABLE—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a decree of specific performance requiring the payment of a certain sum within 120 days, without any supersedeas bond being given, will not be dismissed after the expiration of the 120 days because of cessation of the controversy, where the appellant claims that the decree required the payment of an excessive sum; since if reversed, the appellant would be entitled to a reasonable time within which to pay the proper sum.

SPECIFIC PERFORMANCE—PARTIES ENTITLED—PARTNERS. Plaintiff suing for specific performance of a contract made by a corporation to sell land to himself and one L. cannot enlarge his interest to the exclusion of L. by reason of the fact that L. was interested in and controlled the corporation making the sale, and aided the corporation in its defense and would be benefited by defeating the action.

EVIDENCE—TO EXPLAIN WRITING—AMBIGUITY—VENDOR AND PURCHASER—CONTRACTS. A contract for the sale of land is ambiguous so as to admit parol evidence of circumstances to show whether the price was $150 per acre, or that sum plus certain mortgages on the land, where it fixed the price at $150 per acre and recited that there were certain mortgages on part of the land, to be released on the

[1]Reported in 108 Pac. 601.

payment of specified sums, and provided that the purchasers were to pay all the taxes and interest and the mortgage or mortgages as they became due, and if not so paid, the agreement to be inoperative as to the lands covered by the mortgage or mortgages, which was to revert to the vendor.

Appeal by plaintiff from a judgment of the superior court for King county, Yakey, J., entered March 23, 1909, decreeing the specific performance of a contract, after a trial on the merits before the court without a jury. Modified.

Holcomb & Kirkpatrick, for appellant.

S. M. Brackett and *Walker & Munn*, for respondents.

Crow, J.—This action commenced by W. W. Whipple, against D. H. Lee, the American Investment & Improvement Company, a corporation, and others, to enforce specific performance of a contract for the sale of real estate. An opinion on a former appeal, affirming an order appointing a receiver, is reported in *Whipple v. Lee*, 42 Wash. 266, 89 Pac. 712. The plaintiff now seeks specific performance of the contract, as successor in interest to J. R. Young. A decree of specific performance was entered. The plaintiff, however, has appealed, contending that the decree requires him to pay an excessive consideration for the land.

One hundred and twenty days were granted by the decree to the appellant, within which to pay for the land and obtain a conveyance. No supersedeas bond has been given, and the one hundred and twenty days have expired. The respondents now contend that the appellant cannot hereafter make payment, or demand a deed; that the controversy has ceased, and therefore move to dismiss the appeal. There was nothing for the appellant to supersede. Whether his time for performance would or could be extended by an order of this court in the event of an affirmance, we need not now discuss. The appellant considered himself aggrieved, in that the decree required him to pay too large a consideration. He was entitled to an appeal without giving a supersedeas bond. The

trial court did not intend to, nor did it, deprive him of his right to an appeal by fixing a time for payment which would expire before his appeal, if taken, could he heard in this court. If, on consideration of his appeal, it is established that the decree did require him to pay an excessive price for the land, he would be entitled to a reversal and a reasonable extension of time within which to make payment, under such a decree as this court might order. He might have been unwilling or unable to pay the excessive consideration which he contends was erroneously fixed by the trial court, but willing and able to pay the lesser consideration. In the event of a reversal, he should be accorded the latter privilege. The motion to dismiss is denied.

A number of questions have been raised, but as, in all respects save one, we concur with the findings and conclusions of the trial judge, we will confine ourselves to a consideration of appellant's contention, that the trial court erred in finding that J. R. Young and D. H. Lee had contracted to pay $150 per acre for the land sold, and in addition thereto had also contracted to pay three mortgage liens amounting to $26,500. The record includes a voluminous statement of facts. It is, therefore, manifest that a detailed discussion of the evidence upon which we predicate our conclusions cannot be incorporated in an opinion of reasonable length. Some statements, however, must be made. During the year 1904, the American Investment & Improvement Company, hereinafter called Investment Company, acquired title to a large tract of land, including 158.25 acres involved in this action. On 53.25 acres it executed a mortgage to the Robertson Mortgage Company, a corporation, for $7,500, and on all the remainder it executed first and second unpaid purchase money mortgages to Knight & Williams, copartners, for about $16,000 and $3,000 respectively. On November 20, 1905, it sold the 53.25 acres covered by the Robertson Company mortgage, and about 105 acres or part of the land covered by the Knight and Williams mortgages to D. H. Lee

and J. R. Young, by the written contract upon which this action is based, the contract reading as follows:

"This Agreement, made and entered into at Seattle, Washington, by and between the American Investment & Improvement Company, a corporation, party of the first part, and D. H. Lee and J. R. Young, co-partners doing business under the firm name and style of Lee & Young, parties of the second part.

"Witnesseth: That, Whereas, the party of the first part is the owner of the following described lands, situated in the county of King, State of Washington, to wit: (Description of 153.75 acres.)

"And whereas the said party of the first part is desirous of disposing of the said lands in large tracts, and

"Whereas, the said parties of the second part are a co-partnership formed for the purpose of dealing in real estate and particularly for handling and selling outlying properties.

"Now, therefore, in consideration of one dollar, and other valuable consideration, the party of the first part hereby agrees with the parties of the second part to sell to the parties of the second part or their assigns, the above described lands, upon the agreed price of one hundred and fifty dollars ($150) per acre, and the parties of the second part hereby agree with the party of the first part to buy from the said party of the first part the said lands, and to pay therefor at the rate of one hundred and fifty dollars ($150) per acre, and the commissions and compensation for selling and handling the said real estate or any portion thereof, by the said parties of the second part, shall be whatever sum the parties of the second part shall receive over and above the one hundred and fifty dollars ($150) per acre, and none other.

"The party of the first part further agrees with the parties of the second part that

"Whereas, There are certain mortgages on the said lands, to become due, and interest and taxes to become due thereon, and on payment of the sum of Six Thousand Dollars ($6,000), by the parties of the second part to the first part, that, it, the first party will release the N. W. 1/4 of the S. W. 1/4, section 27, township 26 N. R. 4 E., Willamette Meridian, and on the payment of another and additional six thousand dollars ($6,000) by the parties of the second part to the party of the first part, the first party agrees to release from

the said mortgage lot three (3) and sufficient of the N. E. ¼ of the S. W. ¼ same section, township and range, to make forty (40) acres.

"The said parties of the second part further agree with the party of the first part to pay all the taxes and interest and the mortgage or mortgages, as the same or any of them become due and payable, on the said lands, and if not so paid by the parties of the second part, then and in that event this agreement shall become inoperative as to the lands still covered by such mortgage or mortgages and agreed by the party of the first part to be conveyed to the parties of the second part, and the same shall revert to and remain the property (together with all its rights, privileges and franchises) of the party of the first part. . .

"It is finally mutually agreed that the agreements, covenants and promises herein contained shall extend to the successors and assigns of the party of the first part, and to the heirs, executors, administrators or assigns of the parties of the second part.

"In witness whereof," etc.

On April 19, 1906, the interest of J. R. Young was assigned to the appellant Whipple, and the copartnership of Lee & Young was succeeded by the copartnership of Lee & Whipple. Shortly thereafter the Investment Company, aided by D. H. Lee, attempted to cancel the contract and terminate all rights of Lee & Young and Lee & Whipple thereunder. Other contracts, agreements, and conveyances, both before and subsequent, some affecting only the land here involved and others affecting the entire or larger tract of which it was a part, were executed by the Investment Company and by D. H. Lee, with various parties. Differences, disputes, and litigation ensued, causing receivers to be appointed, but the controlling question now before us, all others being eliminated, is how much consideration were Lee & Whipple, as successors to Lee & Young, required to pay the Investment Company for the 158.25 acres of land. The appellant contends they were to pay $150 per acre only; while the respondents insist they were to pay, in addition

thereto, all three mortgages above mentioned, amounting to $26,500. In other words, that they were to pay $150 per acre, and in addition thereto to discharge the mortgage lien, not only on the land they were buying, but also on all of the larger tract retained by the Investment Company.

Although D. H. Lee, partner of the appellant Whipple, contends the contract has been forfeited and terminated by the Investment Company, he insists that, if it is to be specifically enforced, he is entitled to participate in the fruits of this litigation. At the same time he contends that the consideration for the land includes full payment of all the mortgages, as also does the respondent Investment Company. Throughout this litigation he has continually aided and abetted the Investment Company, apparently against his own interest. This conduct can only be explained upon the theory that his interests and those of the Investment Company are identical. If the company wins, he wins; but if, on the other hand, the appellant succeeds, he, as a member of the firm of Lee & Whipple, insists on sharing the fruits of that victory. The appellant contends that respondent Lee, by reason of his attitude, is not entitled to share in the benefits of a decree enforcing specific performance of the contract, and that the appellant alone should be permitted to perform the contract upon the part of the vendees. It is apparent that the appellant's interest cannot be increased by reason of any inconsistent acts of Lee. Appellant's contention in this regard cannot be sustained.

A careful perusal of the contract shows that it is ambiguous, and that extrinsic evidence must be admitted to aid in its interpretation. The trial court, assuming that this court might consider the contract ambiguous, to aid its interpretation, admitted evidence of surrounding circumstances, contemporaneous agreements, the construction of the parties themselves, and their acts pertaining thereto. Upon consideration of this evidence we conclude that the purchase price was to be $150 per acre only; that $19,500 thereof

was to be applied as payments on the mortgage indebtedness so as to release from the mortgage all of the land sold; that any remainder was to be paid to the Investment Company, and that Lee & Whipple, upon performance by them, were to be entitled to all other interests in the land. Respondents contend that 158.25 acres at $150 per acre would not produce sufficient funds to pay $26,500, the total amount of principal mentioned in the three mortgages. In the light of the evidence we do not construe the contract as directing an application of the purchase money to the payment of the entire $26,500. By the terms of the mortgages to which the contract referred, the payment of $19,500 only was needed to discharge the three mortgage liens on all of the 158.25 acres sold to Lee & Young. The Knight & Williams mortgages expressly stipulated that all of the land subject to their liens, and afterwards sold to Lee & Young, was to be released upon the payment of $12,000. This being true, such payment when made would entitle any interested party to demand the release. Should the mortgagees refuse, the Investment Company or Lee & Whipple, its grantees, could have compelled them to execute and deliver the releases. 27 Cyc. 1415, *Gammel v. Goode*, 103 Iowa 301, 72 N. W. 531; *Lane v. Allen*, 162 Ill. 426, 44 N. E. 831; *Obern v. Gilbert*, 6 Dak. 119, 50 N. W. 620.

J. R. Young, Lee's former partner, who is not interested in the result of this litigation, testified that, before Whipple acquired his interests, Lee & Young attempted to negotiate a sale of the 158.25 acres at $200 per acre, which would yield them a profit; that he and Lee participated in these negotiations, Lee also representing the Investment Company. It is manifest from this evidence that, if they had previously contracted to pay $150 per acre, and also the mortgage liens for the land, they were striving to sell for less than cost and not at a profit. These statements, although denied by Lee, harmonize with the evidence of other witnesses, also denied by him, to the effect that at other times

he repeatedly offered to sell for less than he now contends Lee & Young were to pay for the land. To reach the conclusion for which the respondents contend, we would be compelled to rely upon, credit, and accept evidence of D. H. Lee, which we think has been effectually contradicted and refuted by undisputed circumstances, other written contracts, records of court proceedings, and the testimony of numerous witnesses. Although the trial judge admitted extrinsic evidence to aid in an interpretation of the contract in case such evidence should be held proper by this court, we incline to the view that he must have reached his own conclusions from the contract itself, without the aid of extrinsic evidence, and that in so doing he erred.

We regret that the volume of the record forbids a detailed statement and discussion of the facts upon which we predicate our conclusions. This cause is before us for trial *de novo*. Having examined all the evidence we cannot accept the statements of D. H. Lee upon which the respondents are compelled to rely, and do rely. He has controlled the business affairs of the Investment Company since its organization. All of its acts have been performed at his instance. He has dominated its policy. With the exception of two minor officers of the corporation, who seem to be subject to his dictation and control, he has disagreed and found fault with nearly every person with whom he has come in contact. He has critcised one Owen, a former secretary of the Investment Company, accusing him of wrongfully doing away with the original minute book. He has charged Knight & Williams with wrongful and fraudulent acts. He charges that J. R. Young, his first partner; the appellant Whipple, his second partner; the Vanderventer-Davis Company, a corporation, and one Hayes, its manager, have violated their agreements with him, and he has attempted to forfeit their contracts. In his evidence he, by innuendo, accused the receiver, the receiver's attorneys, and other parties, with mutilating the

minute book of the corporation in an attempt to discredit him. He positively contradicted statements of many disinterested witnesses. In brief, he seems to be in harmony with no one, and unable to transact business satisfactorily on any occasion. He was voted, and claims to have earned, a salary of $5,000 from the corporation, although its records and business affairs have assumed a most deplorable tangle during his administration. During the same period he contracted to give substantially all of his time to the business of Lee & Young. The minute book which he introduced in evidence to sustain his contentions is, by reason of its history and condition, unworthy of serious consideration. A written contract between the Investment Company and Lee & Young, as parties of the first part, and Vanderventer-Davis Company, as party of the second part, executed January 20, 1906, sustains the appellant's position as to the purchase price, although the respondents vigorously contend that it cannot be so construed. In referring to the contract upon which this action is predicated, it contains the following recital:

"And whereas, the said American Investment and Improvement Company made a contract on the 20th day of November, 1905, with D. H. Lee and J. R. Young, copartners as Lee & Young, for the sale and purchase of the said lands at the set price of one hundred and fifty dollars ($150.00) per acre, to be paid by the said Lee & Young to the American Investment & Improvement Company."

Later statements in this contract to which respondents refer do not, in our opinion, negative this statement. Further discussion is unnecessary.

We hold that the price to be paid by the appellant and D. H. Lee was $150 per acre only, and that it should be first applied to the satisfaction of the mortgage liens on the 158.25 acres only. It is ordered that the decree of the trial court be modified in accordance with this opinion; that a further extension of the time, to be fixed by the trial court, be granted the appellant for the performance of the con-

tract, and that otherwise the judgment be affirmed. The appellant will recover his costs on this appeal.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8372. Department Two. May 4, 1910.]

L. K. CHURCH *et al.*, *Respondents*, v. WILKESON-TRIPP COMPANY *et al.*, *Appellants*, J. D. LOWMAN *et al.*, *Defendants*.[1]

BROKERS—CONTRACT—BREACH—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY. The evidence is sufficient to entitle brokers to recover damages for breach of a contract, and a nonsuit is properly denied, where it appears that they were employed by the defendants, promoters of a mining corporation, to sell bonds and stock on commission, that the defendants refused, on demand, to perfect their title to the property or to deliver the bonds, and that the plaintiffs then gave notice that they would rescind the contract and hold the promoters for their commissions as damages sustained.

PARTNERSHIP—BUSINESS NAME—STATUTORY PROVISIONS—RIGHT TO SUE. Partners may maintain an action upon a contract entered into by them as individuals without having complied with Rem. & Bal. Code, § 8369, requiring the filing of a certificate showing their assumed business name and the names of the members of the firm, where before suit brought they filed the required certificate showing that they were then doing business under the assumed name by which they sued, and that they were the only members of the firm.

BROKERS — CONTRACTS — STIPULATIONS — CONSTRUCTION — WAIVER. Where a broker's contract provided for the sale of bonds on commission within a specified time after receiving written notice of the deposit of the bonds, notice in writing is for the protection of all the parties, and is waived where the authorized agent of the principals notified the brokers that the bonds were ready for sale and delivery and that the notice would be waived, and the brokers relied and acted thereon.

BROKERS—CONTRACT OF EMPLOYMENT — BREACH — DAMAGES—EXPENSES INCURRED. Where a broker's contract for the sale of bonds on commission required the brokers to pay all expenses and outlay for advertising, etc., and on breach of the contract, the brokers sued

[1]Reported in 108 Pac. 596; 109 Pac. 113.

to recover all the commissions that they might have earned, they are not entitled to reimbursement for expenses incurred, although pleaded, and evidence thereof should be excluded.

BROKERS—CONTRACTS—ACTION FOR BREACH—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY. In an action by brokers for damages for breach of a contract to sell bonds on commission, breach of the contract having resulted from the admitted failure of the defendants to perfect their title to the property, it is error likely to prejudice the jury to admit in evidence escrow deeds showing the consideration that was to have been paid, the deeds not having been delivered and there being no issue in regard to the title or failure of title.

DAMAGES—BREACH OF CONTRACT—CONTEMPLATED PROFITS—BROKERS—COMMISSIONS. Brokers seeking damages for breach of a contract to sell bonds on commission may recover for loss of profits, since the same are directly contemplated in the contract; but the loss must be reasonably certain, to be ascertained by the jury, although not always capable of precise computation.

EVIDENCE—OPINIONS—CONTEMPLATED PROFITS. The opinion of a witness that brokers could have earned all their commissions on the sale of bonds is inadmissible as a conclusion as to the probable results, and which must be drawn by the jury.

BROKERS—CONTRACTS—BREACH—DAMAGES—CONTEMPLATED PROFITS—EVIDENCE—SUFFICIENCY—EXCESSIVE VERDICT. In an action by brokers to recover damages for breach of a contract to sell an issue of $300,000 in bonds of a mining company, within a specified time, the evidence is insufficient to show that they could have sold all the bonds and earned the entire commissions, where plaintiffs merely proved probable sales to the amount of $25,250, and it appeared that the $300,000 was secured on coal lands recently purchased for the sum of $65,000; and a verdict for the entire commissions is based on conjecture and speculation, and should be reduced to the amount of the commissions on the probable sales shown.

COSTS—ON APPEAL—OF APPEAL BONDS. Under Rem. & Bal. Code, § 6226, providing that any receiver, assignee, trustee, guardian, executor, etc., may include as part of his lawful expenses a reasonable sum paid to a corporation for a surety bond, and that the party entitled to recover costs may include the same in all actions and proceedings, costs on appeal will be allowed for the premium paid for a surety company's bond upon appeal given by a receiver, trustee, etc.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 17, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, for $26,750 for

breach of contract, after granting a nonsuit in favor of certain of the defendants. Affirmed on condition of remitting $22,331.25.

Hughes, McMicken, Dovell & Ramsey, for appellants.

Reynolds, Ballinger & Hutson, for respondents.

Crow, J.—This action was commenced by L. K. Church and Sidney Drake, copartners as S. Drake & Company, against Wilkeson-Tripp Company, a corporation, James C. Drake, A. G. Bennett, Victor E. Tull, Frank Hanford, James M. Ashton, J. D. Lowman, and C. H. Hanford, to recover damages arising out of the defendants' alleged breach of the following written contract:

"Memorandum of Agreement, Made in duplicate this twenty-fourth (24th) day of January, 1908, by and between James C. Drake and A. G. Bennett—(Trustees for and representing the promoters and organizers of the Wilkeson-Tripp Company, hereinafter named)—parties of the first part and L. K. Church and Sidney Drake of Spokane and Seattle, Washington, hereinafter called the parties of the second part,

"Witnesseth: That whereas, the parties of the first part together with their associates, J. D. Lowman, Victor E. Tull, Frank Hanford, C. H. Hanford and James M. Ashton, are the organizers of a certain company now in the process of incorporation, known as the Wilkeson-Tripp Company, and as such they are the owners of those certain coal properties with the rights and privileges in connection therewith, located in Pierce county, in the state of Washington, more particularly described as follows: The east half (E. ½) of section fourteen (14) in township eighteen (18), North, range six (6) east. And whereas, when said company is organized, it is the purpose and intent of the parties of the first part and their associates, to bond its properties for the sum of three hundred thousand dollars ($300,000). And whereas, the parties of the second part have undertaken to place and sell the bonds of said company for the compensation and upon the terms hereinafter mentioned.

"Now therefore, these presents witnesseth: That for and in consideration of the premises and the mutual benefits and

compensations hereinafter referred to, the parties hereto hereby stipulate and agree in manner following:

"First: Said bonds are to be of the following denominations . . . the entire issue to have an aggregate face value of three hundred thousand dollars ($300,000) as above stated.

"Second: The parties of the second part undertake to sell fifty thousand dollars ($50,000) worth of said bonds within sixty (60) days from the time the bonds are deposited with the trustees, under the mortgage securing the same and written notice of the time such deposit is to be given to the parties of the second part or to one of them. The remainder of said bonds are to be sold by the parties of the second part within ninety (90) days after the expiration of said sixty (60) days.

"Third: All of the bonds are to be sold at par and the parties of the second part are to receive ten per cent commission for their services in selling same, such commission to cover and include all expenses and outlay of every kind incurred by the parties of the second part. In this connection, however, it is distinctly understood that the parties of the second part are to have the exclusive right and privilege to sell the entire issue of said company's bonds during the times above mentioned, but, should any sale be effected by other parties acting for or under direction of any of the above organizers, such party shall be allowed by the parties of the second part, five per cent commission upon such sale.

"Fourth: It is understood that the parties of the first part and their associates, shall proceed forthwith and perfect the organization of such company and take all proper steps in the way of drawing and recording the necessary mortgage, and the lithographing of bonds and stock, and all other matters for the purpose of effecting the thorough organization and legally securing the bonds.

"Fifth: It is understood that the parties of the second part shall offer and deliver to every bond purchaser, a stock bonus of the equivalent to fifty per cent of the par value of any bond or bonds, purchased by him, and that the parties of the first part and their associates are to protect the parties of the second part in so doing and see that such fifty per cent bonus in the stock of the company is forthcoming and at the disposal of the parties of the second part for the purpose of making such delivery.

"Sixth: The capital stock of said company is to be not less than six hundred thousand dollars ($600,000), it being the intent that after the payment of one hundred and fifty thousand ($150,000) in stock bonus above shown, there shall be four hundred and fifty thousand ($450,000) dollars of the company's stock available, and that the balance of the $450,000 worth of stock at par, the parties of the second part shall be entitled to receive as further compensation for their services in effecting the sale of bonds, a payment in stock equivalent to five per cent of said $450,000 provided the parties of the second part sell all of the aforesaid bond issue; in the event of their selling less than said issue, then the percentage of stock payable to them from said $450,000 worth, shall diminish in the ratio and proportion that the amount of bonds which they do sell may bear to the entire issue.

"In witness whereof." etc.

A nonsuit was entered in favor of defendants J. D. Lowman and C. H. Hanford, and a verdict for $26,750 was returned against all other defendants, who have appealed from the final judgment entered thereon.

Appellants contend that the trial court erred in denying their several motions for a nonsuit and judgment. Construing the evidence most favorably to the respondents, the following facts are shown: That at the time the written contract was executed, James C. Drake and his associates did not hold title to the coal land; that they had an option to purchase it from one Tripp for $65,000; that the Wilkeson-Tripp Company, a corporation, was formed; that most of its capital stock was subscribed, but that none was issued; that the contract was ratified by the board of trustees; that the bonds and a trust deed were prepared, executed, and left with the American Savings Bank and Trust Company of Seattle, as trustee; that the legal title not being in the Wilkeson-Tripp Company, the trust deed was not recorded; that a deed from Tripp to the appellant Frank Hanford had been placed in escrow to be delivered upon the payment of $65,000; that Frank Hanford had executed and placed in escrow a

deed from himself to the Wilkeson-Tripp Company, reciting a consideration of $175,000; that the appellants intended to have all the title deeds and the trust deed delivered and recorded as soon as the $65,000 was paid; that no written notice of the deposit of the bonds with the trustee was given to the respondents, or either of them, but that an oral notice was given them by Frank Hanford, he directing them to immediately proceed with the sales; that written notice was waived by the respondents for themselves and also by Frank Hanford on behalf of himself and the other appellants; that at a meeting of the trustees of the Wilkeson-Tripp Company previously held, the respondents had been directed to take all orders from Frank Hanford, and to consult him on all matters pertaining to their contract; that the appellants A. G. Bennett, James E. Drake, James M. Ashton, and Frank Hanford, all trustees, were present and participated in the proceedings; that the appellant Victor E. Tull subscribed for stock and had knowledge of respondents' acts; that in pursuance of the oral notice given by Frank Hanford, the respondents opened an office in Seattle, advertised in Seattle and Tacoma papers, issued a prospectus, and attempted to sell the bonds; that a stock book containing blank certificates of the Wilkeson-Tripp Company, signed by its president and secretary, and its corporate seal, were left with respondents that they might issue stock to purchasers of bonds; that in March, 1908, respondents tendered $250 to the trustee, and demanded the delivery of a bond, which they had sold for that amount; that the trustee refused to deliver the bond, being unable to do so for the reasons that the appellant corporation, Wilkeson-Tripp Company, had not yet obtained title, that the trust deed had not been recorded, that the $65,000 purchase money due Tripp had not been paid, and that the bonds were not legally secured; that the respondents demanded of the appellants that they perfect their title, which they failed to do, and that the respondents thereupon notified appellants they would rescind the contract and

hold the appellants for their commissions as damages sustained. Upon these facts the nonsuit was properly denied.

The appellants Ashton and Tull earnestly insist, that neither of them gave or waived the written notice required by the contract; that they knew nothing of the acts of the respondents, and that Frank Hanford had no authority to represent them in giving an oral notice or in waiving a written one. The evidence offered tending to show the authority of Frank Hanford, although disputed, was sufficient to sustain the jury in finding such authority.

It is contended that the respondents are not entitled to maintain this action, because they failed to comply with chapter 145, Laws 1907, page 288 [Rem. & Bal. Code, § 8369 *et seq.*], by filing the certificate therein required, and that one Tom Church, having an interest in the contract, has not been joined as a party. The contract was made by the respondents L. K. Church and Sidney Drake as individuals. Before commencing this action they filed the required statutory certificate, showing that they were then doing business in the name of S. Drake & Company. The evidence shows they were the only members of the firm, and that Tom Church had no relation to the partnership other than as a clerk or employee.

Appellants next contend that the respondents were not entitled to proceed with the sale of the bonds, no written notice that they were ready being given. The notice contemplated was for the benefit of both parties. It fixed the time within which the bonds were to be sold, and the dates upon which the sixty and ninety day periods would expire. It was also intended to protect the appellants from having the bonds placed upon the market before they were properly secured and ready for delivery. The respondents testified that they did not know the appellants had not acquired title; that Frank Hanford had told them the title was perfect; that the bonds were ready for sale and delivery; that the giving of the written notice would be waived, and that they

relied and acted upon his statements. Under this evidence, and other evidence properly admitted, the jury could find, and must have found, that written notice had been waived by all of the appellants.

The respondents have sued for all commissions they would have earned, and the par value of all stock they would have received, had they sold the entire issue of bonds. Having done so, they are not entitled to reimbursement for expenses incurred, although the same were pleaded. By the terms of their contract their commission was to cover and include all expenses and outlay of every kind incurred by them; yet on the trial they were permitted to introduce evidence that they had incurred advertising, office, and other expenses in large amounts. Contracts for advertising were introduced and specific items of expense were shown. The appellants objected to all this evidence and now insist that it was erroneously admitted. The respondents on the trial, disclaiming any attempt to recover for expenses incurred, introduced other evidence to show how many bonds it did sell and could have sold had there been no breach of the contract. This action being for the recovery of all the commissions, and the respondents having contracted to bear all their own expenses, it is difficult to conceive any theory upon which evidence showing their expenses became material. The evidence should have been excluded.

The complaint alleged, and the answer admitted, that the appellants had not acquired any title to the coal land. There was no issue as to the delivery of the deed from Tripp to Frank Hanford, or from Frank Hanford to the Wilkeson-Tripp Company. During the trial it appeared that Frank Hanford was to pay $65,000 to Tripp for his deed, and the respondents offered in evidence the deed from Frank Hanford to the Wilkeson-Tripp Company, which recited a consideration of $175,000. To this offer the appellants objected, contending there was no issue as to the title, or failure of title. It having appeared that Frank Hanford was only to

pay $65,000 for the land, it can be readily understood how knowledge of the fact that he immediately conveyed it to the Wilkeson-Tripp Company by a deed reciting a consideration of $175,000, in the absence of any explanation, which he was not required to make, would prejudice the jury, and affect the amount of the verdict. There was no good reason for permitting the jury to see the deed or know its contents. It tended to prove no issue in the case. This is not an action involving any issue of fraud, but is one arising out of an alleged breach of contract, upon which the respondents predicate their right of recovery. Assuming that Frank Hanford was attempting to defraud his associates—a fact not proven—that circumstance could not, and should not, have any bearing upon respondents' recovery or right of recovery. The failure of title, after being admitted by the pleadings, was not in issue. The trial court erred in admitting the deed in evidence.

The jury returned a verdict for $26,750, which the appellants now claim was excessive. The respondents were to receive a stock bonus and a ten per cent commission on all bonds sold. The evidence shows the they procured a written contract from one Gordon for $5,000 of bonds, on which he paid $200; that they sold by oral contract $10,000 of bonds to one Worms, on which he made a cash payment of $1,400; that they had the oral promise of one Thompson to purchase $10,000 of bonds, no payment being made, and that one Pratt purchased and paid for a $250 bond. No other contracts of sale, written or oral, were made. Respondents claim they had other inquiries from prospective purchasers who were investigating the bonds, but there is no satisfactory evidence to show probable sales to any of these parties, who at the best only contemplated an investigation of the bonds. One J. R. Moore, a broker of quite limited experience in handling securities, testified that he had investigated the bonds and respondents' methods for selling them; that, in his opinion, they could have all been sold at a total

expense of six per cent of their face value; that he, as an employee of respondents, had tried for about three weeks to make some sales; that he had made none, but that he had interested several unnamed parties. This, in substance, is all the evidence showing how many bonds the respondents did sell, or could have sold.

In an action for damages arising out of the breach of a contract, the plaintiff is entitled to recover such losses as he has actually sustained. When the direct purpose of the contract is to enable one of the parties to earn commissions or profits, he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to a recovery of damages for loss of contemplated profits, it must, as a general rule, appear that such loss was reasonably certain and not a fictitious or imaginary one; that fact being established, the damages are to be ascertained by the jury, although not always capable of being precisely measured by exact methods of computation.

"Special damages may be recovered when the party in default had notice of the special circumstances out of which such damages naturally arose but not in the absence of such notice. Remote, speculative or conjectural damages are not recoverable. As a general rule, mere prospective profits are too remote to be considered in estimating damages. Profits are not excluded because of anything inherent in their nature, but because they are remote and contingent, and they may be recovered if proven with reasonable certainty. Profits must be certain in their nature, and in respect to the cause from which they proceed." 13 Current Law, 1184-1185, and cases cited.

The usual rule of excluding profits in estimating damages does not apply where the earning of the profits is directly contemplated in the contract which has been breached.

"In order to recover profits in a case of a breach of contract, such profits must have been within the contemplation of the parties at the time that the contract was made, and where such profits do not enter into the contract itself they will be denied. Anticipated damages, different from those which

would ordinarily be sustained, are not always recoverable, but will only be awarded when in view of special circumstances they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being forseen and of being estimated with reasonable accuracy. In all cases the damages claimed should be capable of being definitely ascertained. Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty no recovery can be had." 13 Cyc. 36.

In *Witherbee v. Meyer*, 155 N. Y. 446, 453, 50 N. E. 58, the court says:

"The grounds upon which is founded the general rule of excluding profits in estimating damages, are (1) that in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote and not the direct and immediate result of a non-fulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract nor can it be said, from its nature and terms, that it was within the contemplation of the parties."

The mere fact that the respondents entered into a contract for commissions upon contemplated sales does not conclusively show their ability to sell all or any of the bonds within the stipulated time. It is difficult to lay down an exact rule by which damages arising from a loss of contemplated profits may be justly measured. It is manifest that the opinion evidence of the witness Moore was not proper as a basis of computation. It was for the jury and not the witness to arrive at a conclusion as to the probable results of the efforts made by the respondents. In *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 670, 85 Pac. 418, 419, this court, discussing profits as an element of damages, said:

"Ofttimes in the breach of a contract of this character, the only damages sustained are those of future profits. These may . . of a substantial character in contemplation of law,

and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred."

In a case of this character much liberality in the admission of evidence tending to show profits lost should be permitted. The circumstances surrounding the parties are to be considered as bearing upon the amount of probable sales the respondents would have made. In an effort to estimate the probable sales and profits arising therefrom, all facts affecting the value and character of the property which secured the bonds should be considered. With this purpose in view, let it be assumed that the appellants had acquired good title to the coal land; that Tripp had been paid; that the title deeds and the trust deeds securing the bonds had been recorded, and that the bonds had been ready for delivery. What amount of bonds could the respondents then have sold? As men of ordinary business capacity and intelligence, they should have anticipated that prospective investors, before subscribing for the $300,000 issue of bonds or for any considerable portion thereof, would investigate the nature, value, and extent of the security covered by the trust deed. They would not rely only upon the advertisements and the prospectus prepared by the interested parties. Upon investigation they would have learned that the only security for the $300,000 issue of bonds actually covered by the trust deed was a half section of coal land for which the appellant had recently paid $65,000 only. To conclude that investors would have purchased all or any considerable portion of these bonds under such conditions involves considerable credulity, and is to assume that they were to be misled as to the actual facts, or that they would invest large amounts without any sufficient security and depend upon future advances in value for their protection. Careful investors do not transact business in any such manner. The parties who had severally

purchased $5,000 and $10,000 of the bonds and had made payments thereon had recently sustained intimate and confidential business relations with one of the respondents, and they undoubtedly confided in him and relied upon his representations. The only other payment actually made was one of $250.

If this were an action for damages resulting from personal injuries, in which the jury would be permitted much latitude in making an award, an excessive verdict would not be sustained. While, as before stated, a liberal rule should be adopted for estimating the damages in this action, we fail to see how a verdict for $26,750 can be sustained. The entire compensation the respondents could have earned in cash and in stock at par had they fully performed the contract would have been seventeen and one-half per cent, or $52,000. The only probable sales shown were those to Gordon, $5,000; to Worms, $10,000; to Pratt, $250; to Thompson, $10,000; $25,250 in all. All other evidence offered to show probable sales is too visionary to become the basis of an award. The utmost that could have been earned on these sales in commissions and in stock at par would have been $4,418.75, and the evidence, which we have liberally construed in favor of the respondents, is not sufficient to sustain a verdict for damages in any greater sum.

Other assigned errors predicated upon instructions given and refused need not be discussed, as the points involved are fully covered by what we have heretofore said. Although we have found that, under the issues framed, the trial court erred in admitting evidence of expenses incurred and the deed from Frank Hanford to the Wilkeson-Tripp Company, reciting a consideration of $175,000, our conclusion is that such error could have been prejudicial only in so far as it may have affected and increased the amount of damages awarded, and that it will not be necessary to direct a new trial except at the election of the respondents. It is therefore ordered that, if within twenty days after the filing of the re-

mittitur herein the respondents shall serve upon the appellants and file with the clerk of the superior court their written election to remit all of the judgment entered in excess of $4,418.75, with interest thereon from the date of the trial, the judgment as thus reduced will be affirmed. Otherwise a new trial will be awarded. The appellants will recover their costs on this appeal.

PARKER, DUNBAR, and MOUNT, JJ., concur.

ON PETITION TO RETAX COSTS.

[Decided June 10, 1910.]

DUNBAR, J.—This is a petition to retax costs. Respondents, in their motion to retax, object to the item in appellants' cost bill, "premium on appeal bond, $280." Section 6226, Rem. & Bal. Code, is as follows:

"Any receiver, assignee, trustee, guardian, executor, administrator, committee, or other fiduciary, required by law to give bond as such, may include as a part of his lawful expenses, such reasonable sum paid to such a corporation for such suretyship, not exceeding one per cent per annum on the amount of said bond, as the head of the department, court, judge or officer by whom, or court or body by which he was appointed, allows, and in all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending."

This section is construed by the petitioners as referring wholly to fiduciary bonds the expense of which had been allowed by the court, and it is their contention that the term "all actions and proceedings," found therein, refers to actions in which bonds have been given by receivers and other assistants of the court to carry out the court's functions, and not the proceedings where bonds are given by parties to effectuate their own purposes. This construction, it seems to us, does not give full effect to the statute quoted. A receiver, assignee, trustee, guardian, executor, administrator, etc., un-

der this statute would be entitled to recompense for his official bond where there was no action of any kind whatever involved, and the statute, after making provision for charges of that kind by said officers, provides generally that, "in all actions and proceedings, the party entitled to recover costs may include therein," etc., thereby making a special provision for actions and proceedings. We are unable to give the statute the limited construction contended for by the petitioners, and the petition will therefore be denied.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8505. Department One. May 4, 1910.]

RUTH MASON, *Appellant*, v. JOHN A. YEARWOOD *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—APPROPRIATION—RIPARIAN RIGHTS. The right to waters by a prior appropriation thereof obtains only in the case of waters upon public lands, and not to waters upon land where the title from the government had been obtained or initiated; since the common law doctrine of riparian rights prevails in this state and would attach to lands acquired from the government, preventing appropriation thereof.

SAME—RIPARIAN RIGHTS—NEW SPRINGS. No riparian rights can be claimed by a lower proprietor in or to the waters of a new spring that breaks out upon the lands of another and flows therefrom across his land, riparian rights attaching only to streams that are wont to flow from time immemorial.

SAME—WATER RIGHTS — PRESCRIPTION — ADVERSE USE—EXTENT—EASEMENTS. Where new springs broke out upon the defendant's land, and the flow constantly increased from year to year, an adjoining owner, who for twenty-five years diverted and continuously used water from the springs, acquired a prescriptive right to the use of so much of the water as she had adversely used during the statutory period of ten years immediately preceding defendant's obstruction thereof; since easements may be acquired by adverse use; but the plaintiff could not enjoin the defendant's use and diversion of the increased flow not diverted and adversely used by the plaintiff ten years previously.

[1]Reported in 108 Pac. 608.

Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered June 14, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the diversion of waters used for irrigation purposes. Affirmed.

O. O. Felkner, for appellant.

Hovey & Hale, for respondents.

FULLERTON, J.—This is an action to enjoin the diversion of water. From the record it is gathered that the appellant, who was plaintiff below, owns land situated in sections twelve and thirteen, township eighteen, north, of range seventeen, east, of the Willamette Meridian. That the respondents own land in section eleven in the same township and range. To the south of the respondents' land, and in the same section, is land belonging to one Haywood. In 1879 one Alanson T. Mason filed a homestead application for the lands now owned by the appellant, together with that owned by Haywood, and thereafter procured title to the same under the homestead laws of the United States. The appellant and Haywood have obtained their titles through mesne conveyances from Alanson T. Mason. The land owned by the respondents was first settled upon prior to 1880. The claim passed from one to another until it reached one Pardee, who settled thereon in March 1884, and in due time obtained title thereto from the government. The respondents derive their title through him. The lands mentioned have a general slope to the east and southeast, and are arid in the sense that they require irrigation to produce crops.

Sometime in the year 1882 or 1883 springs broke out on the southwest corner of the land now owned by the respondents, which caused a swamp to form immediately below and surrounding them, which drained down through a draw extending across the land now owned by Haywood, but which belonged to Alanson T. Mason, onto the land now owned by the appellant. In 1884 Mason caused a ditch to be dug

through this draw to a point on his own land immediately below the swamp formed by the springs, through which he took the water from the swamp across the Haywood land to the land now owned by the appellant, where he put it to a beneficial use. This ditch he and his successors in interest have maintained until the present time. In 1890 or 1891 the respondent dug a small ditch leading from the springs to his house, and took water therefrom for stock and domestic purposes.

In 1902 the respondents, for the purpose of draining the swamp formed by the springs, constructed a ditch on the east side of the swamp, conveying the water to their south line where it entered a ditch constructed on the Haywood land. Subsequently the appellant connected this with her own ditch, and from that time until the spring of the year 1908 the waters therefrom continually flowed down onto her premises where she used it for purposes of irrigation. On the last date mentioned, the respondents constructed a new ditch from this latter ditch eastward on their own land, which had the effect of diverting a considerable part of the water from the springs away from the appellant's ditch. It is to restrain this diversion that the present action is prosecuted.

At the trial there was evidence tending to show that the springs which give rise to the marsh or swamp on the respondents' lands had no existence prior to the year 1882, or, if they flowed at all, it was only for a short time in the spring of the year when the snow of the winter was melting; that what is now swamp and marsh land was then dry so that it could be ridden or driven over at any season of the year. In fact, witnesses testified to cutting hay thereon with a mower as early as the month of June. It was given in evidence, also, that the spring began to be active only after the owners of the lands to the west and above the springs began to irrigate their lands; that the flow increased as irrigation increased, and that this increase has been continuous, there

being much more water flowing from the springs now than did flow therefrom even a few years ago. It appears also that the swamp itself is constantly increasing in size, being much larger now than it was even ten years ago. It does appear, however, that for more than twenty-five years a continuous stream has flown from the springs into the swamp and from the swamp into the drainage and irrigation ditches of the appellant, and from there to her lands where it has been used continuously for the purposes of irrigation. Moreover, it appears that all of the water coming from the springs, except the small quantity taken by the respondent in 1901, which he uses for domestic and household purposes, has been so used, and that its use was without interruption until the respondents made the diversion which gave rise to this action.

The appellant on this appeal makes three principal contentions. She contends, first, that she is entitled to the water from these springs in virtue of a prior appropriation; second, that she is a riparian proprietor on the stream that flows from the springs, and is entitled as such to have the same flow onto her lands as it was wont to flow in a state of nature, without waste or unnecessary diminution by the land proprietors on the stream above her land; and third, that she is entitled to the water by prescription, since she has had the open and notorious possession and use of the same for a period of time longer than the time of the statute of limitations, all the while claiming the right to such possession and use adversely against all the world.

The trial judge, passing on the contentions made in the court below, held that neither the first nor second was maintainable under the evidence, and we think his conclusions in that regard were just. As we held in *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. 1032, the common law doctrine of riparian rights prevails in this state, and that where rights to lands across which a stream of water flows are acquired or initiated prior to any appropriation of the waters of the stream, the rights of the riparian proprietors are determined

by the rules of the common law relating to riparian proprietors, and not by any rule of prior appropriation. The same rules would apply to springs, whether existing from time immemorial or of new creation. They could only be appropriated if existing or appearing on land to which no title had been acquired from the government or initiated looking to such acquirement. So in this case, it seems to us clear that the appellant's predecessor in interest made no appropriation of the waters of these springs until long after initiatory steps had been taken by the respondents' grantors to acquire title to the land on which they appeared. Such being the case, the respondent is entitled to hold them and claim the waters therein as against any claim of prior appropriation.

The contention that the appellant can enjoin a diversion of the water, on the ground that she is a riparian proprietor on the stream flowing from the marsh, is also without foundation. While one may have riparian rights in a stream even though its source be a spring upon the land of another (*Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423; *Miller v. Wheeler*, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065), yet it must be a stream that was wont to flow from time immemorial. The owner of land upon which a new spring breaks out may make such use of the waters as he pleases, notwithstanding it would, if unmolested, cause a stream to flow across another's land. Any other rule would make his estate involuntarily servient to a use to which it was not subject when he acquired it.

The third contention is not discussed in the written opinion filed by the trial judge and we are not advised as to the reasons which prompted him to deny relief on that ground. It has seemed to us that the appellant can justly claim a right by prescription to a portion of the flow from these springs. It is clear from the evidence that the appellant and her predecessors in interest have appropriated and used the waters flowing from the springs, with the exception of that

before mentioned which the respondents have diverted for domestic uses, for a period of nearly twenty-five years. While there is no direct statute governing the matter, the courts generally hold that an easement is acquired in the lands of another by an adverse user for the period of the statute of limitations; *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Ricard v. Williams*, 7 Wheat. 59, 110. So, in this case, the appellant is entitled to the continuous use of so much of the waters flowing from these springs as she has had the continuous adverse use of for a period of ten years immediately preceding the time the respondents diverted it. This does not mean all of the water flowing through her flumes at the time of the diversion, but a quantity equal to the quantity that was wont to flow thereon ten years prior to that time. Since the spring has materially increased in size and flow during the last ten years, the respondents are entitled to check it, if they may, or appropriate to their own use the increase of flow. Their estate in their lands needs stand servient only to the easement they are estopped to dispute from lapse of time. They are not estopped to interfere with the increase of flow occurring within the ten-year period, for otherwise their whole estate might become servient to this particular use.

The appellant cites *Dickey v. Maddux*, 48 Wash. 411, 93 Pac. 1090, to the point that a right to a use of waters arising from springs on the land of another cannot be acquired by adverse use, but this point was not decided in that case. It was the opinion of the writer that the question was there presented, and should have been met and determined, but the court determined the question on other grounds. The doctrine that prescriptive rights in the use of waters flowing across or arising on the land of another may be acquired by adverse user has been repeatedly recognized, if it has not been expressly decided, by this court. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 85

Pac. 6; *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520, 85 Am. St. 955; *Hollett v. Davis, supra.*

The record, however, is not sufficiently complete to enable us to direct the proper judgment to be entered. While it shows that the respondent in 1908 diverted a considerable proportion of the waters then flowing from the springs, probably greater than he was entitled to as of right, it fails to show what the excess was. This could only be determined by ascertaining the quantity of water flowing into the appellant's ditches and flumes at a time ten years prior to the time of the diversion, and substracting that quantity from the quantity now flowing from the springs, but there is nothing in the evidence that enables us to do this, as the appellant seemingly tried her case on the theory that she was entitled to all of the waters flowing from the springs. This was, of course, the fault of the appellant, but we do not think that she should, because thereof, lose her right to recover such proportion of the water as is legally her due. Nor do we think the respondents should be obligated to bear the burden of the cost of the trial of the cause or its appeal to this court. The judgment of the court will be, therefore, that the judgment appealed from stand affirmed, but without prejudice to the right of the appellant to bring a new action for the ascertainment of the quantity of water she is entitled to by prescription, and to perpetually enjoin the respondents from interfering therewith. No costs will be allowed either party in this court.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8542. Department One. May 5, 1910.]

JOHN W. KIRK, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

CARRIERS — OF PASSENGERS — WRONGFUL EJECTION — ASSAULT — ACTIONS — PLEADING — SEVERAL CAUSES. In an action by a passenger for wrongful ejection from a street car, a demurrer to the complaint on the ground that several causes of action are improperly united is properly overruled where but one cause of action is pleaded—that for assault, although it is also alleged that plaintiff was arrested after the assault.

CARRIERS — STREET CARS — RULES — REASONABLENESS — DISOBEDIENCE — EFFECT. The rule forbidding passengers to ride upon the front platform of a street car is reasonable, and a passenger who on notice refuses to obey the rule, until the car is run into the car barn and other passengers are transferred to another car, forfeits his right as a passenger and is not entitled to a transfer or to ride on the second car without paying another fare.

SAME — RIGHTS OF PASSENGERS — TRANSFERS — FORCE — TESTING RIGHTS. A passenger on a street car, denied the right to a transfer or to a ride on a second car without paying another fare, is not justified in inviting the application of force to eject him, but it is his duty to withdraw and test his right in the courts.

SAME — EJECTION OF PASSENGER — FORCE NECESSARY. Where a passenger refuses to pay his fare on a street car, the conductor may eject him, using no more force than is necessary, the amount of force necessary being measured by the force of the resistance offered, in which case the same will not be weighed with nicety.

SAME — FAILURE TO PAY FARE — OFFER BY THIRD PERSON — REPUDIATION. A passenger ejected from a street car for refusal to pay his fare cannot, in an action for wrongful ejection, avail himself of offers made by other passengers to pay the fare, where at the time he expressly repudiated the offers.

SAME — REFUSAL TO PAY FARE — TENDER AFTER EJECTION. After the process of ejection for refusal to pay has begun, either by stopping or applying force, it is too late for the passenger to offer to pay, and the same is no justification for resisting the ejection.

EVIDENCE — OPINION EVIDENCE — ASSAULT. In an action for assault in the ejection of a passenger from a street car, evidence of expressions of sympathy on the part of his fellow passengers, is incompetent and inadmissible as opinion evidence.

[1]Reported in 108 Pac. 604.

Witnesses—Impeachment—Collateral Matters. In an action for assault in the ejection of a passenger from a street car, the motorman cannot be impeached in regard to testimony as to his age, drawn out on cross-examination, as it was a collateral matter.

Evidence—Opinion Evidence—Extent of Damage. In an action for assault, it is error to allow the plaintiff to give his opinion of the monetary extent of his damages.

Damages — Personal Injuries — Proximate Consequences—Expense Items. In an action for an assault, expenses of the plaintiff and his wife while traveling over the country for over a year, including fares, meals, berths, and board bills, are not damages naturally and proximately flowing from the injuries, except as advised by his physician as necessary and proper elements in his recovery, and then only as to items which would not be included in necessary expenses had he remained at home; and items for his wife's expenses only in case he could not travel without her.

Same—Loss of Profits—Diminished Earning Capacity. In an action for injuries sustained in an assault, estimates of profits and commissions in the business of getting out special editions of newspapers, the commissions depending upon the financial success of the ventures, are too remote and speculative to be recoverable; the proper element of damage being the diminution of plaintiff's earning capacity determined by what he was capable of earning before and after the injury.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 24, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by an assault. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Charles A. Riddle and *Wm. M. Watson*, for respondent.

Morris, J.—In this action respondent sought damages for injuries sustained in an assault, claimed to have been committed upon him October 2, 1907, by appellant's servants in charge of its car No. 530. The theory of the complaint is, that respondent was a passenger, having paid his fare upon car No. 311; that the passengers upon car 311 were transferred to car 530 and transfers issued to them, but that a transfer was refused respondent and, upon entering the second car, he became entitled to carriage without additional

payment of fare. The conductor of the second car refused to carry him without a fare, and when payment was refused, he alleges he was set upon by the conductor and motorman and severely beaten. He also sets forth that, at the request of the conductor of the second car, he was arrested and taken to the police station, where, no charge being made against him, he was discharged.

The answer sets forth a rule of the company forbidding passengers from riding upon front platforms of cars; that respondent refused to obey such rule when his attention was called to the same, but insisted upon remaining upon the front platform, and that the car was finally run into appellant's car barn and all the passengers thereon transferred to the second car, except appellant who was refused a transfer, upon the theory that, having violated a reasonable rule of the company and refusing to abide thereby, he forfeited his rights as a passenger and was not entitled to a transfer upon car 530; that immediately upon entering the second car, he was informed that he could not ride thereon without the payment of fare, which he refused, and the employees of the company thereupon undertook to eject him, using no more force than was necessary for that purpose, and being unable to do so, called a policeman to remove him. This affirmative matter being denied, the case went to the jury upon the issues thus raised, and a verdict was returned awarding respondent $6,609. A new trial being denied, the case is brought here for review.

Many questions are presented upon the appeal, it being contended, first, that a demurrer should have been sustained to the complaint, upon the ground that several causes of action were improperly united. There was but one cause of action pleaded—that for assault. The allegation of the subsequent arrest was no part of this cause of action, nor was it the setting forth of a second cause of action. Had the complaint been moved against upon this ground, the reference to the subsequent arrest would doubtless have been stricken.

It was, however, good as against a demurrer, in that it was not set forth as an independent cause of action and then improperly united with the first cause of action pleaded.

Upon the main issue involved, as to the relative rights of the parties, we deem the law well settled. The rule forbidding passengers riding upon the front platform was a reasonable one, and it was the duty of respondent to obey the same when his attention was called to it, and if he wilfully refused to be bound by the rule and enter the body of the car, he thereby lost his rights as a passenger, and the company was not required to issue a transfer to him. Upon entering the second car he was not entitled to ride thereon without the payment of a second fare, and upon demand being made, he should have complied; or if, as there is some evidence to indicate, he desired to test the power of the company to withhold a transfer from him or to refuse him carriage without the payment of another fare upon the second car, it was his duty to withdraw when the company asserted its position, and test his rights in the courts. There was no need, and it was an imprudent act on his part, to insist upon remaining upon the car without the payment of fare, and thus invite the application of force to eject him. The proper way for him to test the question, if he desired to do so, was in the lawful and peaceable procedure of the courts, and not in opposing strength to strength, and permitting the superior force to determine the rights involved. When respondent entered the second car and thus indicated his purpose to seek carriage thereon, the conductor was justified in demanding that he pay his fare or present a transfer. The conductor was under no duty to accept his contention that he was already a passenger because of the payment of the first fare. Respondent could only lawfully continue upon the car by paying fare or producing a transfer. Failing and refusing to do that, he had no lawful right to passage, and the conductor was justified in ejecting him. In doing so, however, he would only be protected in the use of necessary force.

Going beyond that the company must answer for his act. The amount of force lawfully within the right of the conductor must be measured by the stubbornness of respondent's resistance. He had the right to use such force as was necessary to overcome respondent's resistance, and to remove him from the car, and while the amount of force lawfully to be used in the accomplishment of such removal is dependent upon the force used in resisting it, the measurement of force with force with exactness is a difficult problem for either court or jury, and hence it has become established that neither court nor jury should be required to weigh with too much nicety the amount of force necessary to an ejectment from the car in the face of the resistance offered. *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108.

This, then, was the issue to be submitted to the jury; Did the employees of the company, in their endeavor to eject respondent from the car, use and employ more force than was necessary to overcome the resistance offered by respondent, accompanied by proper instructions as to the rights of the parties as herein indicated? Respondent contends that, while he did not personally offer to pay his fare, other passengers proffered a fare for him. It is immaterial to the company from whom it receives its prescribed fare. If another offered to pay respondent's fare, it was the same as if respondent himself had offered to do so, and the conductor would be bound to accept it. *Louisville & N. R. Co. v. Garrett*, 76 Tenn. 438, 41 Am. Rep. 640. But such payment on the part of others must be acquiesced in by those in the position of respondent, either by an express assent or by silence which will be construed as an acceptance. *Gates v. Quincy O. & K. C. R. Co.*, 125 Mo. App. 334, 102 S. W. 50. In the record before us, it appears that, when tenders of fare were made by outsiders, the respondent said to them: "Don't pay my fare for me. I paid my fare and I am entitled to ride home." Respondent, having thus expressly repudiated such payment, cannot thereafter claim any benefit from the

offers. This rule is likewise subject to this additional modification: Such offer on the part of others, or on the part of those whom it is sought to eject, must come before the attempted ejectment. In *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278, it is said:

"The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion had commenced, is not only uncalled for, for the just protection of the recusant passenger, but would tend to encourage a practice which, if indulged in, would interfere with the convenience of the company, and the dispatch and quiet to which other passengers are entitled."

A like rule is announced in *O'Brien v. New York Cent. & H. R. R. Co.*, 80 N. Y. 236, and *Pease v. Delaware L. & W. R. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699. Hutchinson on Carriers (3d ed.) § 1085, vol. 2, thus cites the rule and gives many authorities in support:

"The prevailing rule, and the one supported by the better reasons, is that even though he may once have refused to pay his fare or show his ticket, he may at any time before the process of ejection is begun, comply with the demand and continue his journey on that train; but that where he so refuses and persists in his refusal, after being accorded reasonable time and opportunity to comply, until the conductor has the right, and it is his duty to eject him, and the conductor has begun the process of ejection either by stopping the train or applying force to the passenger when necessary, the passenger thereupon forfeits his rights as a passenger and his ejection may be completed even though he may thereafter tender the performance demanded."

No error was committed by the court below in its instructions upon these rules of law of which we have been speaking, but inasmuch as they are involved in determining the respective rights of the parties and we have decided to grant a new trial for errors committed, we have thought it best to consider them in order to simplify and determine the rules which should govern the court in the new trial.

Respondent was permitted to interrogate witnesses as to expressions of sympathy on the part of the passengers, and that he appealed to them to determine his action, and that they insisted on his remaining. This was clearly error. Questions of this character, irrespective of the answers, should not have been allowed, as they called for expressions of opinions on the part of the passengers, which were not competent and could not be testified to by those expressing such sentiments or by those who heard them.

Respondent was also permitted to impeach the motorman of the first car in regard to his testimony as to his age. This was error. The age of the first motorman was an immaterial matter, and there was no necessity for any inquiry in regard to it. It was clearly a collateral matter and, if respondent was permitted to cross-examine the witness as to his age, he was bound by his answer and could not subsequently impeach him. It is too well established to require citation that a witness may not be impeached in a collateral matter.

Respondent was permitted to give his opinion of the monetary extent of his damages. This was also error. It was for respondent to give to the jury the character of his damage, but it was for the jury to determine its extent and fix the compensatory amount of his loss.

Respondent was also permitted to give to the jury an itemized statement of the expenses of himself and wife while traveling over the country for over a year, including railway fares, meals, sleeping car berths, and board bills, from Seattle to Los Angeles, Columbus, Ohio, and other places, amounting to the sum of $964. This was error, as the itemized bill manifestly included items that could not be properly characterized as damages naturally and proximately flowing from the injuries complained of. If, upon the advice of his physician, respondent went to Los Angeles to subject himself to conditions which were necessary and proper elements in his recovery, the necessary transportation and other expendi-

tures of the trip, incurred for items which would not have been included in his necessary expenditure had he remained at home, would be proper elements of damage. The like expense of his wife, if respondent's condition was such that he could not make the trip alone, would also be an item of damage. Such also would be the amounts necessarily paid for medicine and medical attendance. To such extent only were the items included in the expense statement admissible.

The court charged the jury that the respondent was entitled to recover for "loss of profits, commissions, and pecuniary rewards, by reason of said injuries." This was error, as under the evidence such profits and commissions were highly speculative in their nature. There may be cases where there can be a recovery for loss of profits where, by reason of some definite contract, such profits can be definitely ascertained, but where, as in this case, they are based upon an estimate of what could have been earned had respondent been in good health and earning power, they become speculative and remote and are nonrecoverable. The proper element of damage in cases of this character is loss of earning power, if any. If, by reason of his injuries respondent's earning capacity was diminished, the extent of such diminution was a proper element of recovery, and could be arrived at by determining what he was capable of earning before and after his injury. But estimates of profits and commissions in his business, which was that of assisting in getting out special editions of newspapers in all sections of the country, respondent's commissions depending upon the financial success of the venture, were altogether too speculative and remote.

Other errors are assigned in the instructions of the court, but what has heretofore been said is determinative of them, and there is no necessity for special reference to them.

The judgment is reversed, and the cause remanded for a new trial.

Rudkin, C. J., Fullerton, Chadwick, and Gose, JJ., concur.

[Nos. 8725, 8679. Department Two. May 5, 1910.]

MARIE WILSON, *Appellant*, v. CATHERINE McGILLIVRAY, *Respondent.*

THE STATE OF WASHINGTON, *on the Relation of Marie Wilson, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *R. B. Albertson, Judge, Respondent.*[1]

APPEAL—DECISIONS REVIEWABLE—VACATION OF DEFAULT—FINALITY. An order quashing the service of summons and vacating a default judgment, leaving the case pending for further proceedings, is not appealable, as it can be reviewed on appeal from the final judgment.

SAME—FINALITY OF ORDER. Where the record shows that defendant is out of the state and cannot be served, an order quashing service of summons and opening a default does not in effect determine the action and prevent final judgment, where it does not appear that substituted service by publication and attachment could have been had; since finality of the order must appear on the face of the record.

CERTIORARI—WHEN LIES—ORDERS REVIEWABLE ON APPEAL. A writ of certiorari does not lie to review an order that is not appealable because reviewable upon appeal from the final judgment.

Appeal from an order of the superior court for King county, Albertson, J., entered December 15, 1909, vacating a judgment and quashing the service of summons, after a hearing before the court. Dismissed.

Brady & Rummens, Peters & Carr, and *McMartin & Dricken*, for appellant.

James F. McElroy, for respondent.

MOUNT, J.—This appeal is from an order vacating a judgment and quashing the service of summons. It appears that the appellant brought an action against the respondent and obtained service by leaving a copy of the summons with an

[1]Reported in 108 Pac. 620.

employee of an apartment house in Seattle where the respondent once occupied an apartment. Thereafter, on November 11, 1909, the complaint and return of service were filed, and an order of default was entered against the respondent. On the same day a judgment was entered in favor of the plaintiff for $20,000. Thereafter, on November 29, 1909, the respondent appeared specially and moved the court to quash the service of the summons and to vacate the judgment, upon the ground that no service of the summons had been made. This motion was granted and the court, on December 15, 1909, made an order vacating the judgment and quashing the service of the summons. The action was not dismissed. The plaintiff appeals from that order, and the respondent moves the court to dismiss the appeal.

This motion must be sustained. In *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902, after citing several cases we had theretofore decided upon this point, we said:

"The rule deducible from these decisions is this: If an order vacating a judgment, or quashing a summons or the service thereof, is or may be followed by further proceedings in the cause, and the entry of a final judgment therein, such order may be reviewed on appeal from the final judgment, and is not itself appealable. If, on the contrary, the order vacating the judgment, or quashing the summons or the service thereof, in effect determines the action or proceeding and prevents a final judgment therein, the order itself is a final one, and is therefore appealable."

This case is one which may be followed by further proceedings, for the action was not dismissed but is still pending.

It is suggested by counsel for appellant that the record shows that the respondent is without the state, and that personal service cannot be made. But the record does not show that substituted service by attachment may not be had. Where the action is not dismissed and it does not appear upon the face of the record that the order in effect determines the action and prevents a final judgment therein, we cannot look outside the record for facts which might show that the

action is finally determined by the quashing of the summons. Finality of the order must appear upon the face of the record as it did in the cases cited in *Tatum v. Geist*, before the order may be held final and, therefore, appealable.

Application is also made for a writ of review in case the appeal is dismissed. But because the order is not a final one and may be reviewed upon final judgment, this application must also be denied.

RUDKIN, C. J., CROW, DUNBAR, and CHADWICK, JJ., concur.

[No. 8383. Department Two. May 6, 1910.]

KATIE WALTERS *et al.*, *Respondents*, v. SPOKANE INTERNATIONAL RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—RAILROADS—DEFECTIVE ROADBED—EVIDENCE—SUFFICIENCY. A finding that a derailment was due to the defective condition of a railway roadbed is sustained, where there was competent evidence that the track was new, inferior ties had been used, the rails had not been spiked to all the ties, it was not properly surfaced or ballasted, and the train that was derailed was running at moderate speed.

EVIDENCE—RES GESTAE—STATEMENTS OF EMPLOYEES—REMOTENESS. Statements made by the conductor of a derailed train to the effect that the accident was caused by the pulling of spikes, the spreading of the rails, and a "bum track," are admissible as part of the *res gestae*, where it appears that he was the company's chief representative in charge of the train, that he went forward and was the first to reach the scene of the accident, where he gave attention to two men fatally injured, that he ran about a mile and occupied some time in sending a long distance telephone for relief, and walked back to the train, where he arrived almost two hours after the accident, at which time the statements were made under conditions of responsibility and anxiety tending to render them spontaneous and truthful, without their being the result of reflection or premeditation; the question of remoteness being within the discretion of the trial judge, and to be determined by the circumstances of each case (RUDKIN, C. J., dissenting).

[1]Reported in 108 Pac. 593.

RAILROADS—DEFECTIVE TRACK—EVIDENCE—ADMISSIBILITY—TRIAL. Upon an issue as to the defective condition of a new railroad track and roadbed which caused the derailment of a train, it is not error to exclude evidence offered by the railroad company to show that the same was in as good condition as is customary with roads of like age, where great latitude was allowed in receiving evidence of experienced men as to all the details of proper construction and condition of new tracks.

DEATH—EXCESSIVE DAMAGES. A verdict for $20,000 for the death of a railroad brakeman is excessive, and should be reduced to $15,000, where the deceased was forty-four years of age, earning $100 to $120 per month, with a life expectancy of twenty-five years.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 14, 1908, upon the verdict of a jury rendered in favor of the plaintiffs for $20,000, in an action for the death of a railway employee. Reversed, and a new trial ordered unless $5,000 is remitted.

Allen & Allen and *Graves, Kizer & Graves*, for appellant, to the point that the statements of the conductor were not part of the *res gestae* and were inadmissible, cited: 2 Wigmore, Evidence, § 1422; 3 Id., § 1747; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Merkle v. Bennington*, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666; *Lambert v. La Conner Trad. & Transp. Co.*, 30 Wash. 346, 70 Pac. 960; *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L. R. A. 895; *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636.

Charles P. Lund and *Hamblen & Gilbert*, for respondents.

CROW, J.—This action was commenced by Katie Walters, in her own behalf and as guardian *ad litem* of John S. Walters and William H. Walters, minors, against Spokane International Railway Company, a corporation, to recover damages for the death of William H. Walters, husband and father of the plaintiffs. From a judgment in their favor, the defendant has appealed.

William H. Walters, while serving the appellant as head

brakeman on a freight train, was so badly scalded in a derailment of the engine on which he was riding that he died the next day. The respondents alleged the accident was due to negligence of appellant in permitting its roadbed, track, rails, and ties to be and remain in an unsafe condition. The appellant alleged that the accident occurred in Idaho; that under the laws of that state William H. Walters was a fellow servant of George E. Kendall, the engineer, who caused the wreck by negligently running the train at a dangerous speed, and that Walters was guilty of contributory negligence in failing to set the brakes. The jury returned a verdict for $20,000, and answered interrogatories propounded at appellant's request, as follows:

"(1) Was defendant's roadbed in a weak and insecure condition at the point where the wreck occurred? Answer: Yes.

"(2) If you answer that it was, state in what respects it was weak and insecure. Answer: The track was not properly surfaced and ballasted; and that a large percentage of the ties were culls; and a large percentage of the ties were of black pine, and the roadbed was too narrow.

"(3) Were the rails insecurely fastened to the ties at the point where the wreck occurred? Answer: Yes.

"(4) At what rate of speed was the train running at the time it left the rails? Answer: Between sixteen and twenty miles per hour.

"(5) At what rate of speed was it reasonably safe to run a train like the one that wrecked, over the track at the place where it was wrecked? Answer: We are unable to state.

"(6) Was the wreck occasioned by a defective condition of the track and roadbed, or by the rate of speed of the train, or by the condition of the track and roadbed and the rate of speed jointly? Answer: The wreck was caused wholly by the defective condition of the track and roadbed?"

Appellant first contends the evidence was not sufficient to sustain a recovery, and that the trial court erred in denying its motion for a directed verdict. As stated by appellant's counsel, "The record in this case is of fear-inspiring bulk."

The evidence is too voluminous to be stated in this opinion. We find it sufficient to sustain a verdict in respondents' favor. There was competent evidence that appellant's track, although new, was in a dangerous condition; that inferior and unsafe ties had been used in its construction; that the rails had not been spiked to all the ties; that the track had not been properly surfaced; that the road had not been ballasted; that the train was running at a moderate and safe rate of speed, and that the unsafe condition of the track caused the rails to spread and ditch the engine. Other evidence offered by appellant tended to show that the track although new was safe, well constructed, and in good condition; that it was being constantly examined and repaired by appellant's employees; that the accident was caused by the act of the engineer, who ran the train at a reckless and dangerous rate of speed, and that the appellant was without fault. This conflicting evidence was properly submitted to the jury, and it is manifest from their verdict and special findings that they accepted and credited the statements of the respondents' witnesses.

Immediately after the accident, J. D. Lahey, the conductor in charge, went forward from the rear end of the train, saw the ditched engine, the condition of the track, rails, and ties, and the injured men. Returning to his caboose, he attempted to attach a telephone instrument to the wires, and call appellant's head offices at Spokane, nineteen miles distant. Failing in this, he ran about one mile to a farm house, where he obtained the use of a long distance telephone and occupied about twenty-five minutes in calling Spokane and arranging for a relief train, and assistance for the injured men. He then walked back to his train. Living at the house was one Samuel Williams, who dressed himself and, accompanied by one Scharpenberg, followed the conductor. The accident occurred about 10:45 p. m., and it was almost two hours later when Williams reached the train. Walters, the head brakeman, and the engineer Kendall were fatally injured. They

had been removed to the conductor's caboose, where they were awaiting medical assistance. Williams, as a witness for respondents, testified in part as follows:

"Q. Just state what the conductor said there at that time. A. Well he said that it was caused by a rail, the spikes pulling out and letting the rail turn over and the spreading of the track. . . . Q. What did he say at that time about the condition of the roadbed or about the company maintaining a roadbed? A. Well he said it was a bum track."

These alleged statements were admitted as part of the *res gestae*, and the appellant now insists that the trial court erred in overruling its objections thereto; that the statements were incompetent, immaterial, and hearsay, being made long after the accident, and that they constituted no part of the *res gestae*. It appears that Williams and his companion were the first persons to reach the train after the accident, other than those upon the train; that the conductor was appellant's chief representative then upon the scene and in charge of the train. He had the injured brakeman and engineer in his care. Both of them were severely injured, suffering intensely, in need of immediate medical attention, and were receiving such assistance only as the remainder of the train crew could give. The conductor was in a condition of responsibility and anxiety which directly tended to render his statements spontaneous, impulsive, and truthful, and to negative the idea that they might be the result of reflection. Appellant insists that his statements were too remote in point of time from the actual ditching of the train to be admissible. Although it is the usual rule, that contemporaneous declarations, explanatory of the principal occurrence, made under circumstances excluding the idea of premeditation, are competent as part of the *res gestae*, it is not always essential to their admissibility that the declarations and principal occurrence shall be identical in point of time. In many instances the former may succeed the latter by a considerable period. This court has so held in numerous cases: *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Lambert v. LaConner Trading &*

Transp. Co., 30 Wash. 346, 70 Pac. 960; *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L. R. A. 895; *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636.

It is not always necessary that statements or admissions should be exactly concurrent with the principal act if they arise naturally therefrom, without evidence of premeditation, and directly tend to characterize or explain it. The surrounding circumstances and conditions may be shown, and the determination of the competency and admissibility of the declarations as a part of the *res gestæ* will then, as a general rule, rest largely in the sound discretion of the trial judge. Mr. Wigmore, at § 1700, vol. 3, page 2256, of his work on Evidence, says:

"It is to be observed that the statements *need not be strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway, and to be dissipated. The fallacy, formerly entertained by a few courts, that the utterance must be strictly contemporaneous (post, § 1756) owes its origin to a mistaken application of the Verbal Act doctrine: . . . Furthermore, there can be *no definite and fixed limit* of time. Each case must depend upon its own circumstances: . . . Since the application of the principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles. There is a lamentable waste of time by supreme courts in here attempting either to create or to respect precedents. Instead of struggling weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court. Until such a beneficent result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession."

The authorities differ as to the instances in which such declarations should be admitted. The circumstances of each case should be carefully weighed by the trial judge in exercising his sound discretion and in arriving at a correct determination. *Grant v. Oregon R. & Nav. Co.*, 54 Wash. 678, 688, 103 Pac. 1126.

In *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. 661, 666, the court said:

"When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard-and-fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. . . . These circumstances of time and place do not alone necessarily prevent a declaration from being part of the *res gestae*, but they are factors, with other circumstances, in determining whether the declarations were the spontaneous utterances of the mind under the immediate influence of the transaction. . . . Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be."

It necessarily devolves upon the trial judge to pass upon the competency of the evidence offered. In *Roberts v. Port Blakely Mill Co.*, *supra*, the declarations of the superintendent were made about three hours after the accident. In passing upon their admissibility as part of the *res gestae*, this court said:

"The declarations of Mr. Tew were not the narration of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held to be in the presence of it, and were made under such circumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible."

The appellant, citing the recent case of *Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776, contends that it is controlling here. That case can be readily distinguished. The conductor had left the scene of the accident, had proceeded with his usual employment, had taken his car to the end of his run, had returned on another trip, and could not have anticipated that he would again meet the driver of the wagon at the place where the collision had occurred. It was a fortuitous circumstance that he did so. He had ample time to devise, contrive and reflect, and his statements made after his return were properly excluded as hearsay, and not a part of the *res gestae*. Although the conductor in this case had left his train, he did so under compulsion, for the purpose of procuring assistance. His train remained in the ditch at the place of the accident, and was still in his charge. He was the principal representative of the appellant. Two of his crew who had been fatally injured were without medical attention. Much responsibility rested upon the conductor. He had telephone instruments to communicate with his superiors in case of necessity. When needed, these instruments failed to perform their functions. His trip to the farm house one mile distant was one of necessity, made in the midst of grave responsibilities. Before the evidence of Williams was admitted the respondents called the conductor and had him narrate the details of his trip and the length of time he thus occupied. The trial judge saw him and the witness Williams, and heard them both testify. He heard other evidence describing the accident, and the surrounding circumstances. He was in a position to exercise his sound discretion and determine whether

the alleged declarations should go to the jury for their consideration as a part of the *res gestae*, and we cannot find that his discretion was abused. The conductor was permitted to, and did, deny the evidence of the witness Williams. The jury were able to pass upon their credibility, and conclude whether the alleged declarations were made, and if made, whether they were spontaneous and truthful, or the result of reflection. A vast amount of evidence, showing all the circumstances, was introduced and considered by the jury, and we do not feel that we would be justified in concluding that the trial judge has so abused his discretion in admitting this evidence as to constitute prejudicial error and necessitate a new trial.

Appellant further contends that the trial court erred in refusing its offer of evidence to show that its roadbed and track were in as good condition as is customary with roads of like age and carrying like traffic. The appellant was permitted to introduce evidence of experienced railroad men showing proper methods of construction, the ties, rails, and other material that should be used, how the grade should be made, how the track should be surfaced and ballasted, the tendency of a new track to settle after rains, and in fact all details on the subject. The record is of sufficient length to satisfy the most critical that much latitude was accorded both parties in the introduction of evidence. The appellant was granted every reasonable opportunity for showing facts which would aid the jury in finding whether the track was in as reasonable and safe a condition as it should be.

The appellant further insists the judgment is excessive. This contention must be sustained. The evidence shows that the deceased was a man forty-four years of age; that he had been stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and brakeman; that at the time of the accident he was making from $100 to $120 per month, and that his life expectancy was twenty-five years. Verdicts must be compensatory only. After full compensation has been reached, no further award should be made. The judg-

ment is excessive. It is ordered that, if within thirty days after the filing of the remittitur the respondents shall serve upon the appellant and file with the clerk of the superior court their written consent to remit $5,000 of the damages awarded, the judgment as thus reduced, with interest from the date of the trial, be affirmed, and that otherwise a new trial will be granted. The appellant will recover its costs in this court.

DUNBAR, MOUNT, and PARKER, JJ., concur.

RUDKIN, C. J. (dissenting)—I cannot agree that statements made by the conductor, under the circumstances disclosed by the record, two hours after the accident, were a part of the *res gestae*, and I therefore dissent.

[No. 8437. Department One. May 10, 1910.]

PETER MORRISON *et al.*, *Respondents*, v. JOHN BERNOT, *Appellant*.[1]

SET-OFF AND COUNTERCLAIM—CONNECTION WITH SUBJECT-MATTER OF ACTION—INJUNCTION—DAMAGES. In an action to enjoin the defendant from filling up a drainage ditch constructed by the plaintiffs, an independent claim by defendant for damages to his land by reason of the construction of the ditch is not a proper counterclaim, within Rem. & Bal. Code, § 265, authorizing a counterclaim for a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action.

APPEAL AND ERROR—RIGHT TO APPEAL—WAIVER—ESTOPPEL—PROSECUTING ANOTHER ACTION. Error in dismissing defendant's counterclaim is waived by his prosecution of another action for the same claim, and estops him from prosecuting an appeal from the judgment dismissing the first action.

APPEAL AND ERROR—DECISIONS REVIEWABLE—DENIAL OF TEMPORARY INJUNCTION—INSOLVENCY. Under Rem. & Bal. Code, § 1716, subd. 3, an appeal does not lie from an order denying a temporary injunction unless the party against whom the temporary injunction was sought was found to be insolvent.

[1]Reported in 108 Pac. 772.

SAME—REVIEW. Questions not passed upon by the trial court are not reviewable on appeal.

SAME—DECISIONS REVIEWABLE—ORDER OVERRULING DEMURRER. An order overruling a demurrer is not appealable.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered May 8, 1909, dismissing, on motion of the plaintiff, an action and appellant's cross-complaint therein seeking injunctive relief. Also, appeal from an order of said court, Sullivan, J., entered May 22, 1909, denying a temporary injunction to the appellant in a subsequent action commenced by him against the former plaintiff. Appeals dismissed.

Jones & Salsbury and *W. C. Jones*, for appellant.

R. M. Barnhart and *Fred C. Pugh*, for respondents.

RUDKIN, C. J.—Many years ago Peter Morrison and others, owning lands along the shore of Saltese Lake in Spokane county, and claiming title to the bed of the lake by virtue of their upland ownership, constructed a drainage ditch from the foot of the lake across certain lands now owned by John Bernot. Before the commencement of the two actions hereinafter mentioned, Bernot threatened to fill in the ditch to protect his lands from erosion and other injuries caused by its construction and maintenance. Morrison and others thereupon commenced an action in the superior court of Spokane county against Bernot to restrain such threatened action on his part. The defendant, Bernot, by answer and cross-complaint, alleged that he had made a valid appropriation of the waters of the lake for irrigation and other purposes; that he proposed to fill in the ditch and dam the foot of the lake to retain the waters therein for the purposes aforesaid; that his lands were damaged by the past maintenance of the ditch, and prayed for injunctive relief restraining the plaintiffs from interfering with him in the prosecution of his enterprise, and for damages for past in-

juries. The allegations of the answer and cross-complaint were put in issue by reply. Thereafter the court dismissed the action on motion of the plaintiffs, without trial, and against the objection and protest of the defendant.

Upon the dismissal of this action, the defendant, Bernot, commenced a second action against the plaintiffs in the first mentioned action for injunctive relief. The complaint in the second action was almost identical with the cross-complaint in the first action, except the latter complaint omitted any claim for damages. An application for a temporary injunction in the second action was refused, and appeals have been prosecuted by Bernot from the judgment of dismissal in the first action, and from the order denying the motion for a temporary restraining order in the second action. The two appeals were consolidated and presented to this court on the same briefs and arguments. Important questions of practice and substantive law have been ably presented in the briefs and on the oral argument, but for reasons to be presently stated, many of these questions are not properly before us for review.

The first error assigned is based on the dismissal of the first action. Rem. & Bal. Code, § 264, provides, that the answer of the defendant must contain among other things, "(2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." The next section defines a counterclaim as follows:

"The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

"(2) In an action arising on contract, any other cause

of action arising also on contract, and existing at the commencement of the action." Rem. & Bal. Code, § 265.

Rem. & Bal. Code, § 408, provides, that an action may be dismissed, or a judgment of nonsuit entered:

"(1) By the plaintiff himself, at any time before the jury retire to consider their verdict, unless setoff be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action."

Under these several sections, the appellant contends that his answer set up a counterclaim to the specific property or thing which was the subject-matter of the action, and that it was error to dismiss the first action without his consent. The respondents, on the other hand, contend that the answer contained neither a set-off nor a counterclaim. The claim for damages set forth in the cross-complaint, if treated as an independent cause of action in favor of the appellant, was not a proper counterclaim in an action for injunctive relief, but the claim for damages was a mere incident to the other relief sought and need not be further considered.

Omitting the claim for damages as an independent cause of action, as we must, the cause of action set forth in the counterclaim or cross-complaint and the cause of action set forth in the complaint in the second action are identical, and the commencement of the second action was a clear waiver of any error in the dismissal of the first. In other words, the dismissal of the complaint in the first action carried with it the cross-complaint or counterclaim, and the appellant was at liberty to prosecute an appeal from the judgment of dismissal, or to prosecute a new action for the same cause, but manifestly he could not do both, for the rule is well established that if a party, after judgment against him, prosecutes another action based upon the same cause, he thereby estops himself to appeal from the first judgment or bring error to review it. *Carr v. Casey*, 20 Ill. 637; *Gordon v. Ellison*, 9

Iowa 317, 74 Am. Dec. 353; *Liebuck v. Stahle*, 66 Iowa 749, 24 N. W. 562; *Ehrman v. Astoria R. Co.*, 26 Ore. 377, 38 Pac. 306. Inasmuch as the appellant has waived his right of appeal from the first judgment, or is estopped to further prosecute it, such appeal must be dismissed.

The second appeal is from an order denying a motion for a temporary injunction. Rem. & Bal. Code, § 1716, subd. 3, provides,

"That no appeal shall be allowed from any order denying a motion for a temporary injunction or vacating a temporary injunction, unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent."

There was no finding of insolvency in this case, and therefore the second appeal must also be dismissed. Nearly the entire argument before this court was addressed to the merits of the respective actions, and more especially to the title of the respondents to the bed of the lake, but these questions were not passed upon by the court below and cannot properly be passed upon by this court on appeal. It may be that the merits of the case were in a measure considered by the trial court on the hearing of the demurrer to the complaint and answer in the first action; but if so, the order overruling the demurrer is not appealable, and the merits of the case could not have been considered on the hearing of the motion to dismiss.

The questions which the appellant has presented on this appeal can only be considered by this court after the court below has disposed of them on the final hearing of the second action. For the reasons stated, the two appeals must be dismissed, and it is so ordered.

GOSE, FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8244. Department Two. May 11, 1910.]

YOUNG MEN'S CHRISTIAN ASSOCIATION OF NORTH YAKIMA, *Appellant*, v. JAMES GIBSON *et al.*, *Respondents*.[1]

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—BUILDING CONTRACTS—RELEASE OF PARTY TO CONTRACT. Where a firm of building contractors dissolved partnership before completion of a building, the owner did not release the retiring partner, or acquiesce in his release by the copartner, by merely writing a letter and making a payment individually to the copartner without mention of the firm, in the absence of any intent to do so; and therefore the surety on the building contract would not be discharged from liability by reason of the release of one of the parties.

SAME — DISCHARGE OF SURETY — SUPERINTENDENT'S ESTIMATES — PARTIAL PAYMENTS. Where the superintendent of construction, as representative of the owner, is by the contract made the agent of all parties for the purpose of making estimates and certificates for partial payments as the work progressed, payment by the owner in good faith of estimates that were too high will not discharge the surety on the building contract, although the superintendent did not properly discharge his duties and the certificates might not have been sufficient to bind the owner; since the estimates were not final or intended to be absolutely correct.

SAME—DISCHARGE OF SURETY—PAYMENTS—CONTRACT—FILING OF RECEIPTS—"SUBCONTRACTOR." A surety on a building contract is not discharged by the owner's making partial payments without requiring the contractors to file receipts showing that all claims for labor and material for the previous month were paid, where the contract only required the contractors to file receipts showing that all *subcontractors* had been paid in full to the amount of the estimates; as "subcontractor" is used in its technical sense and does not include laborers or materialmen.

SAME—DISCHARGE OF SURETY—CONTRACT—CONDITIONS—WAIVER. A provision in a building contract that the superintendent shall audit and certify to the cost of completing the building after abandonment by the contractors does not apply, so as to work a discharge of the surety if not complied with, where the surety waived its right to complete the building on condition that the contract for completing it be let to the lowest of three bidders who should give a bond for the faithful performance of the special contract.

[1]Reported in 108 Pac. 766.

INDEMNITY—BONDS—DEFENSES—IMMATERIAL QUESTIONS. In an action on an indemnity bond guaranteeing a building contract, the failure to audit a claim for demurrage, as required by the contract, is immaterial where other valid claims exceeded the penalty of the bond.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—RESPONSIBILITY OF PRINCIPAL. A surety company that guaranteed the faithful performance of a contract by a copartnership that had undertaken contracts to the amount of $200,000 on a capital of $400, cannot escape liability because the owner let the contract to such a partnership.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 5, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Englehart & Rigg, for appellant.

Peters & Powell and *Wende & Taylor*, for respondent Aetna Indemnity Company.

RUDKIN, C. J.—On the 13th day of February, 1907, the Young Men's Christian Association of North Yakima, a corporation, organized and existing under the laws of this state, entered into a contract with Gibson & Smith, a copartnership, for the construction of a stone building on certain lots owned by the association in the city of North Yakima. The contract called for the completion of the building on or before the 15th day of October, 1907, for a consideration of $36,794. A further consideration of $1,200 was subsequently agreed upon to cover certain changes in the plans and specifications, making the total contract price $37,994. The only provisions of the contract and specifications deemed material on this appeal are the following:

"The construction of the entire work will be supervised by a superintendent, who shall be the authorized representative of the building committee.

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the

performance of any of the agreements herein contained, such refusal, neglect or failure, being certified by the superintendent, the owner shall be at liberty, after two days' written notice to the contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the superintendent shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work, and to enter upon the premises and to take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the superintendent, whose certificate thereof shall be conclusive upon the parties.

"Between the 1st and 10th of each month during the progress of the work, the building committee will pay to the contractor a sum equal to 80 per cent of the value of the work done and materials used in the construction of the building during the previous month as assessed by the superintendent, and the balance thirty days after the completion of the work herein included, or a certain number of payments as may be agreed upon, each of said payments to be made on the certificate of the superintendent, signed by him, setting forth the amounts estimated for each part of the work, and that the payment is properly due. Said certificate, however, is in no way to lessen the final responsibility of the contractor, nor to exempt him from liability to make good any work or materials afterward found to be defective.

"After the first certificate is given by the superintendent, no further certificate will be issued until the contractor files receipts with the superintendent and building committee showing that each and every subcontractor has been paid in full to the amount of the estimate as per the certificate of the previous month. Said receipts shall remain in possession of the building committee or its appointed representative as the property of the building committee.

"The work herein included shall be commenced as soon as practicable after the contract is signed and the bids accepted, and shall be finished, complete in every detail and ready for acceptance on or before October 15, 1907; or in case of failure on the part of the contractor so to do, he shall forfeit the amount of $20.00 per day for each and every day following said date until said completion, said amount to be retained by the association as agreed and liquidated damages, and in full compensation for all damage by the association sustained on account of the failure of the contractor to perform his contract within the time in said contract specified."

On the 16th day of February, 1907, the defendant the Aetna Indemnity Company, a corporation, executed and delivered to the association a bond, in the penal sum of $10,000, conditioned for the faithful performance of the foregoing contract, subject to the following conditions:

"If the said principals shall voluntarily abandon said contract, or be lawfully compelled by the obligee to cease operations thereunder by reason of their nonperformance of any of its terms or conditions, then the surety shall have the right, in its option, to assume the said contract and to sublet or complete the same, and if said contract shall be assumed by the surety, then as such contract is duly performed, any reserve, deferred payments and all other moneys provided in said contract to be paid to the principals shall be paid to the surety at the same time and under the same conditions as by the terms hereof, such moneys would have been paid to the principals had the contract been duly performed by them. And if said obligee shall complete or relet the said contract, then any forfeitures provided in said contract against the principals shall not be operative as against the surety, but all reserves, deferred payments and all other moneys provided in said contract which would have been paid to the prin-

cipals had they completed the contract in accordance with the terms, shall be credited upon any claim the said obligee may make upon said surety.

"The said obligee shall retain the last payment and reserve due said principals until the complete performance by said principals of all the terms, covenants and conditions of the contract on said principals' part to be performed and until the expiration of the time within which liens or notices of liens may be filed, by reason of anything done in or towards the performance of said contract, and until the cancellation and discharge of such liens, if any, and said surety shall be notified in writing before said last payment shall be made or said reserve paid.

"If any suits at law or proceedings in equity are brought against said surety to recover any claim hereunder, the same must be instituted within six months after the completion of the work specified in said contract."

Construction work commenced under the contract soon after its execution, and continued until on or about the 15th day of November, 1907, at which time the contractors abandoned the contract and refused to complete the building. Between the commencement of work and the abandonment of the contract, the association paid to the contractors the sum of $30,635, on monthly estimates certified or OK'd by the superintendent in charge of the work. In addition to the amount paid to the contractors, the association was compelled to, and did, pay the sum of $7,393.42 to satisfy and release certain judgments, liens, and lienable claims against the property, and the further sum of $11,506.44 to complete the building, making the total cost of the building to the association the sum of $49,535.16, or $11,531.36 in excess of the contract price. The present action was instituted against the contractors and the indemnity company, to recover the last mentioned sum, together with the sum of $4,820 for 241 days' delay in the final completion of the building. Judgment by default was taken against the contractors, and from a judgment in favor of the indemnity company, after trial, the association has appealed.

The amount paid by the appellant to secure a completion of the building, according to the terms and conditions of the building contract, is not challenged, and we will, therefore, direct our attention to the different defenses interposed and urged by the respondent.

The answer alleged affirmatively: (1) That the action was not commenced within six months after the completion of the work specified in the contract; and (2) that the defendant Smith withdrew from the contract and released all his rights and interest therein to the defendant Gibson, and that the appellant and the defendant Gibson released the defendant Smith from all liability under the contract, without the knowledge or consent of the respondent. These defenses are not sustained by the testimony. The action was commenced well within six months after the final completion of the building, and there is no competent proof tending to show that the appellant released, or assented to, or acquiesced in, the release of any party to the contract. There is testimony tending to show that the copartnership existing between Gibson and Smith was dissolved by mutual consent, about two weeks before the abandonment of the contract, and that the appellant had notice of such dissolution from newspaper reports and otherwise. It further appears that one letter was addressed to the defendant Gibson, individually, by the chairman of the building committee, and one check issued to him individually after the dissolution, without naming or referring to the copartnership. But the appellant could not prevent a dissolution of the partnership or a release of one member of the firm by the other, nor could it prevent either of the parties to the contract from carrying out the contract and completing the building. The writing of this letter and the giving of the check did not constitute a release of one of the partners, or an acquiescence in his release by the other partner, in the face of testimony on the part of the appellant that it did not, and did not intend to, release any party to the contract. There was no testimony to the contrary.

It is next contended that the appellant paid moneys to the contractors without requiring them to produce certificates from the superintendent, as required by the building contract and specifications. Before each payment was made a certificate in substantially the following form was presented to the building committee:

North Yakima, Wash., ————, 1907.

Estimates of material and labor used on the Y. M. C. A. Building during the month of ————, 1907.

Pay roll	$3,029.00
Brick	900.00
Lime	125.00
Sand	150.00
Lumber	250.00
Blacksmithing	27.00
Back on labor from last estimate	1,626.00
Total	$6,107.00
$6,107.00 less 20 per cent	$6,107.00
20 per cent	1,221.40
$1,221.40 amount due	$4,885.60

O. K.—H. W. Hughes, Supt.
O. K.—B. F. Barge, Chairman.
Gibson & Smith.

The sufficiency of these certificates is challenged, and it must be confessed that the superintendent was extremely lax in the discharge of his duties. One at least of the estimates was prepared by the contractors, and the others were taken largely if not wholly from the contractors' books. It further appears that the estimates in some cases, if not in all, included the value of material on the ground and not used in the building, and that the estimates were too high. If this were an action by the contractors to recover the amount of one or more of these estimates, it may well be that the property owner would not be bound by estimates thus made or obtained. *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787.

But these estimates were merely the bases of partial payments under the contract and were not intended to be either final or absolutely correct. Had the appellant refused to

make payments on such estimates a release of the surety would doubtless be urged on that ground. While the superintendent was nominally and in fact the agent of the building committee, under the provisions of the building contract, he was the agent of all parties concerned for the purpose of furnishing these estimates, and the appellant having acted upon them in good faith and without fraud, we have no hesitation in saying that its conduct in that behalf did not release the surety.

It is next contended that payments were made by the appellant without requiring the contractors to produce receipts, showing that all claims for labor and material for the previous month had been paid. If such were the agreement of the parties, the question thus presented is not free from difficulty, but we do not so read their contract. The provision above quoted from the specifications required the contractors to file receipts with the superintendent and building committee, showing that each and every *subcontractor* had been paid in full to the amount of the estimates, as per the certificate of the previous month. This did not require the superintendent or committee to exact receipts for all claims for labor and material. The term *subcontractor* has a well defined meaning in building contracts, and the word was doubtless used here in its technical sense. A subcontractor is one who takes from the principal contractor a specific part of the work, and the term does not include laborers or materialmen. *Farmers' Loan & Trust Co. v. Canada & St. Louis R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. The testimony is indefinite as to what, if any, part of the work was done by subcontract, but there is no testimony in the record tending to show that any claims were paid without the production of the requisite receipts from subcontractors.

It is next contended that the superintendent did not audit or certify to the cost of completing the building after the abandonment by the contractors, prior to the commencement of the present action. There would be force in this contention

if the building was completed by the owner after the abandonment under the terms of the original building contract, but the respondent reserved the right to complete the building itself under the terms of its bond, in case of an abandonment by the original contractors, and waived that right after such abandonment, on condition that the contract for completing the building should be let to the lowest of three bidders who should give a bond for the faithful performance of the contract. The building was completed under this special contract, and the contract as let fixed the cost of the work. There was no claim to audit under such circumstances, and the provision for auditing in the original contract has no application.

It is further contended that the claim for demurrage should have been audited and certified by the superintendent, and this is perhaps true, but inasmuch as other valid claims exceed the penalty of the bond, a discussion of that question would serve no purpose. Other questions are discussed in the briefs, but they require no special consideration. The respondent is disposed to criticize the appellant for letting the contract to a copartnership that had undertaken contracts to the amount of $200,000 on a capital of $400, but it seems to us that that question concerned the surety more than the owner. The surety is the party who guaranteed the faithful performance of the contract, although it seems to have lost sight of that fact, and is now seeking to satisfy the obligation of its bond by showing slight irregularities on the part of the owner, rather than performance of the contract by the principals. On the entire record, we are convinced that no substantial or meritorious defense to the action exists, and the judgment is accordingly reversed, with directions to enter judgment in favor of the appellant and against the respondent for the full penalty of the bond, with interest from date of commencement of the action.

CROW, DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8328. Department Two. May 11, 1910.]

JYNTARO TSMURA, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—STATUTE—CONSTRUCTION. A common laborer engaged in loading a flat car with rails that had been used in repair work, who was injured through the negligence of co-employees in the same work, is not engaged in interstate commerce, within the meaning of the Employer's Liability Act, 35 Stats. 65, making common carriers by railroad while engaged in interstate commerce liable for injuries to employees resulting from the negligence of co-employees, it not being shown where the rails came from or were to go.

SAME. To avail oneself of the benefit of such statute, the burden of proof is upon the plaintiff to show that his duties directly pertained to, and were a part of, interstate commerce.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 7, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

F. V. Brown and *A. J. Laughon*, for appellant, contended, among other things, that the attempted regulation of master and servant by the employer's liability act is not within the powers conferred upon Congress by art. 1, § 8 of the Federal constitution and is an unlawful infringement upon the powers reserved to the states by the tenth amendment. *County of Mobile v. Kimball*, 102 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *In re Rahrer*, 140 U. S. 545; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *United States v. Knight Co.*, 156 U. S. 1; *Hooper v. California*, 155 U. S. 648; *Paul v. Virginia*, 8 Wall. 168; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110. The act violates the fifth and fourteenth amendments in that it adopts an arbitrary and unreasonable classification, and the liabil-

[1]Reported in 108 Pac. 774.

ity is not based upon the hazardous character of the employment in which the employee may be engaged. *Gulf, Colorado & S. F. R. Co. v. Ellis*, 165 U. S. 150; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Akeson v. Chicago, B. & Q. R. Co.*, 106 Iowa 54, 75 N. W. 676; *Smith v. Burlington C. R. & N. R. Co.*, 59 Iowa 73, 12 N. W. 763; *Pearson v. Chicago, M. & St. P. R. Co.*, 47 Minn. 9, 49 N. W. 302; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Lavallee v. St. Paul M. & M. R. Co.*, 40 Minn. 249, 41 N. W. 974; *Schroeder v. C. R. I. & P. R. Co.*, 41 Iowa 344; *Potter v. C. R. I. & P. R. Co.*, 46 Iowa 399; *Malone v. Burlington C. R. & N. R. Co.*, 61 Iowa 326, 16 N. W. 203, 47 Am. Rep. 813; *Luce v. Chicago etc. R. Co.*, 67 Iowa 75, 24 N. W. 600; *Foley v. Chicago etc. R. Co.*, 64 Iowa 644, 21 N. W. 124; *Matson v. Chicago etc. R. Co.*, 68 Iowa 22, 25 N. W. 911; *Reddington v. Chicago, M. & St. P. R. Co.*, 108 Iowa 96, 78 N. W. 800; *Jemming v. Great Northern R. Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209.

McWilliams & McWilliams, for respondent, contended, among other things, that the act is constitutional. *Railroad Companies v. Schutte*, 103 U. S. 118; *Jones v. Habersham*, 107 U. S. 174; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 106; *Adair v. United States*, 208 U. S. 161, 178; *Watson v. St. Louis etc. R. Co.*, 169 Fed. 942, 944; *Spain v. St. Louis etc. R. Co.*, 151 Fed. 522; *Snead v. Central of Georgia R. Co.*, 151 Fed. 608; *Plummer v. Northern Pac. R. Co.*, 152 Fed. 206; *Kelley v. Great Northern R. Co.*, 152 Fed. 211. The plaintiff is within the provision of the em-

ployer's liability act. *Stubbs v. Omaha etc. R. Co.*, 85 Mo. App. 192; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 473, 71 S. W. 208, 94 Am. St. 746, 60 L. R. A. 249; *Id.*, 194 U. S. 628; *Union Pac. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571; *Atchison etc. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814; *Atchison etc. R. Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567; *Chicago etc. Co. v. Stahley*, 62 Fed. 363; *Snead v. Central of Georgia R. Co.*, and *Kelley v. Great Northern R. Co., supra;* Thornton, The Employers' Liability and Safety Appliance Acts, Ed. 1909, p. 50, note. The act is remedial and is to be liberally construed. *Johnson v. Southern Pac. Co.*, 196 U. S. 1; Thornton, The Employers' Liability and Safety Appliance Acts, Ed. 1909, p. 114. The classification adopted is not within the prohibition of the fourteenth amendment. *Watson v. St. Louis etc. R. Co.*, 169 Fed. 942; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. Louis R. Co. v. Herrick*, 127 U. S. 210; *Chicago etc. R. Co. v. Pontius*, 157 U. S. 209; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348; *Sweet v. Rechel*, 159 U. S. 380, 392.

Crow, J.—Action by Jyntaro Tsmura against Great Northern Railway Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant has appealed.

The appellant contends that the trial court erred in overruling its demurrer to the complaint, its objection to the introduction of evidence, its challenge to the sufficiency of the evidence, and its motion for a directed verdict. Respondent, in substance alleged that the appellant is a duly organized railway corporation, organized under the laws of the state of Minnesota, doing business as a common carrier by railroad in that state and in the states of Washington and Montana; that the respondent was employed by the appellant at an agreed wage or hire in the capacity of a common laborer in the state of Montana; that on July 6, 1908, the respondent

while so employed was engaged in the work of repairing appellant's main track and replacing rails thereon, and was directed by appellant's assistant roadmaster and assistant foreman to aid in loading on a flat car a number of rails which lay opposite appellant's railway track and which had been used in repairing the track; that while respondent and his coemployees were engaged in raising one of the rails from the ground and placing it on the car, certain of such coemployees, at the further end of the rail, suddenly, violently and without due care, threw their end of the rail on the car in such a manner as to injure the respondent; that the coemployees whose negligence is complained of were common laborers engaged in the same capacity as respondent in constructing and repairing appellant's railway track and loading the rails; that by an act of Congress passed in the year 1908, and approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," under the provisions of which act this case is brought, it was enacted as follows:

"Be it enacted by the senate and house of representatives of the United States of America in Congress assembled: That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. (3) That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 35 Stat. at Large, p. 65, ch. 149.

The appellant pleaded the defense of negligence of fellow servants, contributory negligence, and assumption of risk. From these pleadings it is manifest that the respondent predicates his right of action on the act of Congress approved April 22, 1908. The appellant contends, (1) that the act is unconstitutional and void; (2) that if it be held constitutional, its provisions are not applicable to the facts of this case, it not appearing that the respondent when injured was engaged in interstate commerce. In the *Employers' Liability Cases*, 207 U. S. 463, the supreme court of the United States held the act of Congress approved June 11, 1906, 34 Stats. 232, known as the Employers' Liability Act, to be unconstitutional and void, for the reason that, while it was addressed to all common carriers engaged in interstate commerce and imposed upon them a liability to their servants for damages for personal injuries sustained through the negligence of fellow servants, it did so without qualification or restriction as to the nature of the employment in which the servants were actually engaged at the time of the injury, and that it extended such liability in favor of *all* servants, whether their employment did or did not pertain to interstate commerce. In other words, the law was held invalid for the reason that it was too broad in its scope, in that it dealt with and regulated the liability of a master to all

servants without regard to the fact that many of them might be engaged in the discharge of duties which constituted no part of, or had no connection with, interstate commerce. The later act, approved April 22, 1908, was drawn and enacted for the express purpose of avoiding these defects, and it is manifest that Congress intended to make it applicable only to a servant who might, at the time of his injuries, be engaged in the performance of duties directly pertaining to interstate commerce, or, in the words of the act itself, "while he is employed by such carrier in such commerce." We do not think we are called upon to pass upon the constitutionality of the latter act, as, in our opinion, it cannot in any event be held applicable to the facts before us, and it is only necessary for us to pass upon appellant's second contention.

Assuming that the second act, approved April 22, 1908, is constitutional, do its provisions apply to the facts of this case? The evidence shows that the respondent with a number of his fellow servants was engaged in loading rails on a flat car; that it was the duty of all these servants to throw the rail on the car at a given signal; that respondent's fellow servants negligently attempted to throw it before the signal was given, thereby causing his injuries; and that, before loading the rails, respondent and his fellow workmen had been engaged in changing old rails for new rails on appellant's main line. There is no evidence of negligence on the part of the appellant or any of its servants, other than respondent's fellow servants engaged in the same work with him. It is not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded.

The respondent's theory seems to be that, because the appellant was authorized to, and did at times, engage in interstate commerce, and because the respondent was employed in loading a flat car with rails which had been used, or were to be used, in the repair of its roadbed in the state of Montana, he was necessarily engaged in interstate commerce within the

meaning of the act. We cannot assume that every employee of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employees whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions, it is, in our opinion, open to the same objections which rendered the earlier act unconstitutional. If respondent is to avail himself of its benefits, the burden devolves upon him to show that the duties which he was performing while an employee of the appellant were of a character that directly pertained to, and were a part of, interstate commerce. No such showing was made, and appellant's motion for a directed verdict should have been sustained.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., PARKER, and MOUNT, JJ., concur.

[No. 8670. Department Two. May 11, 1910.]

PUGET SOUND WAREHOUSE COMPANY, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

INSPECTION—GRAIN—STATUTES—CONSTRUCTION—TAX FOR INSPECTION. The grain inspection law, Rem. & Bal. Code, § 5980 *et seq.*, entitled an act for the regulation of public warehouses, relating to the shipping, grading and inspection of grain, and defining the duties of railroads, warehousemen, etc., was designed to protect the owner or shipper of grain from frauds practiced by public warehousemen, and is not broad enough to cover the inspection of grain shipped by an owner to himself, the same not being stored in a public warehouse.

SAME—CONSTITUTIONAL LAW—POLICE POWER. A tax for the inspection of grain shipped by the owner to himself cannot be sustained by reference to the police power, where the same was not to go through a public warehouse.

[1]Reported in 108 Pac. 955.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 25, 1910, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defense, in an action of replevin. Affirmed.

The Attorney General, W. V. Tanner, Assistant, and *George T. Reid,* for appellant.

Hayden & Langhorne, for respondent.

CHADWICK, J.—The object of this action is to test the constitutionality of the grain inspection law as amended by the statute of 1909. Laws 1909, chap. 137, p. 519 (Rem. & Bal. Code, § 5980 *et seq.*), in so far as it relates to shipments by and consigned to the owner of grain or other warehouse products referred to in the act. The Puget Sound Warehouse Company was the owner of one carload, three hundred and ten sacks, of wheat, at Creston, Washington, which it loaded upon a car belonging to the Northern Pacific Railway Company, for shipment to Tacoma, Washington. The wheat was consigned by the owner, the warehouse company, to itself, and not for storage in any public warehouse. The wheat was not sold or offered for sale. Upon receipt of the car at Tacoma, the freight charges were tendered by the owner, and delivery of the wheat demanded. This was refused by the railway company, whereupon action was brought to recover possession of the grain. The railway company defending admitted all the material facts, but set up as a legal defense that:

"Under the provisions of chapter 137 of the Laws of 1909 the Railroad Commission of Washington has fixed a fee of seventy-five (75) cents for the inspection and weighing of each carload of grain received in Tacoma over the line of defendant's road, and requires defendant to pay such fee and treat the same as advance charges. Said act makes such fee a lien upon such grain. Upon receiving said car of grain No. 90,744 at Tacoma, defendant made out and presented to plaintiff a bill showing the freight charges thereon to be $77.00, and the inspection fee to be 75 cents, and defendant

thereupon offered to surrender said car of grain to plaintiff upon the payment of said sum of $77.75, but the plaintiff declined to pay said inspection fee and declined to pay any greater sum than the amount of said freight charges. Defendant is ready and willing to deliver said car of grain to plaintiff upon the payment of the sum of $77.75, and the only reason why defendant refuses to deliver said car of grain to plaintiff is because plaintiff declines to pay said inspection fee of 75 cents."

A demurrer to this affirmative defense being sustained, the railway company refused to plead further. Judgment was entered in favor of the warehouse company. The railway company having no interest in the subject-matter of the controversy or in this appeal, briefs were filed and the case is presented on behalf of the state railroad commission by the attorney general.

Upon appeal the respondent urges, as grounds for sustaining the judgment of the trial court, several propositions of law:

"1st. The statute, to wit: chapter 137 of the session laws of 1909, does not apply to the shipment of grain by a consignor to himself.

"2nd. The statute does not apply in any case to a shipment made to other than a public warehouse.

"3rd. The act does not apply except for grain for milling and export, and passing through a public warehouse at an inspection point.

"4th. If the statute is held to apply to the case of one shipping grain to himself, and to shipments other than to public warehouses, then it is unconstitutional because it is not proper police regulation.

"5th. The statute, if so construed, is unconstitutional because it provides for state inspection and weighing in Seattle, Tacoma, Spokane, and such other cities as the railroad commission may from time to time designate."

From the view we take of this case, it is only necessary to discuss the first, second, and fourth propositions, and these together. It is frankly admitted by the attorney general up-

on oral argument that, if the law is sustained, it must be because it comes within the police power of the state.

That the state has a right to pass inspection laws cannot be doubted, but in all such cases the power must be referable, in some degree, at least, to some recognized subject of police control. Although the state may act arbitrarily in a proper case and its act will be upheld, it cannot do so without reason. The act so plainly carries its own meaning and construction that it would seem to be sufficient to rest our judgment upon its title: "An act for the regulation of public warehouses, relating to the shipping, grading, inspection and weighing of grain and hay, defining the duties of railroads, warehousemen and millers in relation thereto, providing penalties, etc."

It, like the act of 1895, ch. 109, was clearly designed to protect the owner or shipper of grain from the frauds practiced by public warehousemen in returning false weights and grades. The whole tenor of the act, as well as every express declaration, is aimed at the regulation and the protection of the public from the impositions of the warehousemen. Section 9 of the act (Rem. & Bal. Code, § 5988) refers to the charges made by any public warehousemen, providing that they shall be just, fair, and reasonable. Sections 10, 11, 12, 17, 18, 19, 20, 21, and 30 (Rem. & Bal. Code, §§ 5989-5991, 5996-6000, 6009), refer in terms to public warehouses or warehousemen, and do not even inferentially refer to shipments made by an owner which are consigned to himself. There is nothing in the law, nor indeed is it so contended except as it may appear inferentially, to sustain the theory that the state has the right to impose a tax for inspecting grain in the possession of the owner, and which may never be stored or offered for sale. Nor can the act be sustained by reference to the police power of the state. The public can have no possible interest in the character or quality of the grain shipped by an owner from one station in the state of Washington to another, although it be one of the points

designated for inspection. Nor is there anything in the character of the shipment calling for the exercise of this extraordinary power. Grain is not in itself dangerous to handle; it is not perishable so as to become, under ordinary conditions, unfit for food; it is not explosive; it does not carry or breed disease; its shipment or use does not tend in any degree to incite a breach of the peace, lower the moral standards, or encourage crime.

The cases cited in no way bear out the contentions of the state. In the case of *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 94 Am. St. 889, 60 L. R. A. 947, the law (sale of goods in bulk) was sustained upon the theory that it was designed to prevent frauds among individuals. The court recognized in express words that there must be some abuse in the suppression of which the public is interested. In *Gundling v. Chicago*, 177 U. S. 183; *McLean v. Arkansas*, 211 U. S. 539, 546; *Powell v. Pennsylvania*, 127 U. S. 678; *Public Clearing House v. Coyne*, 194 U. S. 497; *State v. Wilson*, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71, and *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, the public in each case had a direct and positive interest to protect the community from frauds and impositions in food products or from false weights and measures; for as was said in *State ex inf. Hadley v. Goffee*, 192 Mo. 670, 91 S. W. 486, without some protection, one who ships his grain to a public warehouse would be at the mercy of those who handle it and would, in the ordinary course of business, have no convenient or adequate means of verifying the classification and weight of his grain. It is upon these theories that the public warehouse and inspection laws are sustained. But this case does not fall within any of them. We cannot assume that an owner who ships and consigns his grain to himself needs any protection, or will be guilty of a fraud against himself. The design of the law is to protect an owner against the acts of third parties.

We therefore conclude (1) that the grain inspection law

is not broad enough to cover inspection of grain shipped by an owner to himself, there being nothing in the record to indicate that it is to be stored in a public warehouse; (2) that if it were so, a tax upon such shipment could not be sustained by reference to the police power.

Judgment affirmed.

Rudkin, C. J., Crow, Mount, and Dunbar, JJ., concur.

[No. 8358. Department Two. May 13, 1910.]

Charles H. Muehlman, *Appellant*, v. Spokane & Inland Empire Railroad Company, *Respondent*.[1]

Appeal—Review—Verdict. A special finding of the jury contrary to undisputed evidence and unsupported by any testimony must be disregarded.

Master and Servant—Fellow Servants—Safe Place—Defective Scaffold. Where it was customary for carpenters to construct such scaffolding as they and their co-employees needed in the progress of the work, and the master retained no supervision over the construction, and furnished suitable material and employed skillful workmen to put it up, the master is not liable to a fellow carpenter who was not present when the scaffold was erected, but who joined the crew later and fell by reason of insufficient material used in its construction; since the negligence was that of fellow servants.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 7, 1908, in favor of the defendant notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee by falling from a scaffold. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant.

Graves, Kizer & Graves, for respondent.

Crow, J.—This action was commenced by Charles H. Muehlman against the Spokane & Inland Empire Railroad

[1]Reported in 108 Pac. 764.

Company, to recover damages for personal injuries. A verdict was returned in his favor, but thereafter the defendant's motion for judgment *non obstante veredicto* was sustained and the action was dismissed. The plaintiff has appealed.

The sole question presented for our consideration is whether the trial court erred in sustaining the motion. The respondent railroad company was erecting depots at stations along its line of road, and one P. L. Peterson was in general charge of the work. The appellant, a carpenter, was injured at Waverly, where a new depot was being erected. Experienced carpenters employed by Peterson were doing the work, during the progress of which it became necessary to construct a scaffold for their use. Thereupon the foreman directed them to erect the scaffold, but gave no further instructions. Suitable material was on the ground. The carpenters, without supervision of appellant or its foreman, selected such material as they needed, and built the scaffold according to their own plans. Thereafter they used the scaffold for about one week. During this period appellant and another carpenter had been left at Spring Valley, one of respondent's stations, to complete work on another depot. On August 29, 1907, they reported at Waverly to work with the carpenters on the depot there. Appellant was set to work upon the scaffold with the other carpenters, and while so engaged a plank and cross-piece broke, causing him to fall. He contends that the scaffold was not properly constructed; that it was of insufficient strength; that improper material had been used; that the respondent was negligent in failing to furnish him a safe place to work or a safe scaffold on which to work, and that by reason thereof he was injured without any negligence upon his own part. The jury answered a number of interrogatories, and appellant relies upon the following answers:

"(1) Q. Did the defendant have at its railway depot at Waverly sufficient and proper material for the erection of such a scaffold as was necessary for the construction of the build-

ing? A. No. (2) Q. Did the defendant intrust the erection of the scaffold to competent carpenters? A. No."

There is no evidence to sustain these findings. Four or five disinterested witnesses testified that the respondent did have an abundance of suitable material at its depot at Waverly for use in the erection of a proper scaffold; that the material actually used was selected by the carpenters who built the scaffold; that one McNulty and one Johnston, experienced carpenters, built that portion from which the appellant fell, and that one of them selected the particular plank and crosspiece which broke and caused appellant's fall, although it did not distinctly appear which one did so. The evidence further shows that respondent did intrust the erection of the scaffold to competent, experienced carpenters, who built it for the use of themselves and of other carpenters engaged in building the depot. None of this evidence is disputed. Appellant made no attempt to meet it. The witnesses who testified to these facts were neither parties to nor interested in this action, and there was no other evidence on the subject. The findings above quoted being unsupported must be disregarded.

Answering a further interrogatory, the jury found, and the evidence shows, that the respondent did not exercise any supervision over the erection of the scaffold, or give any instruction in regard to it other than to direct that it be constructed. Ascribing the utmost value to appellant's evidence, it appears that the falling of the scaffold was caused by the carelessness or bad judgment of the carpenters in selecting and using unsafe material in its construction, although respondent had provided an abundance of proper, safe, and sound material. In support of its motion for judgment the respondent cited, and the trial court followed, *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114. In every essential particular that case and this one are identical. In each it appeared that the plaintiff had no part in building the scaffold; that it was customary for the carpenters en-

gaged in the erection of the building to construct for use such scaffold as they might need in the progress of the work, and to do so without any direction as to details by the foreman; that the master, through the foreman, retained no supervision over the erection of the scaffold, and gave no directions with reference thereto; that the master furnished on the ground a sufficient quantity of suitable material for its erection which he intrusted to competent, experienced, and skillful workmen, and that the only negligence, if any, which caused the injury, was that of the workmen in selecting and using improper material. In the *Metzler* case we said:

"Where the master retains no supervision over the erection of the staging, and gives no directions in regard to it, but provides suitable materials therefor, and intrusts the duty of its construction to skillful workmen he is not liable to one of the workmen for injuries resulting from the falling of the staging, though insufficiently built. . . . The respondent through his foreman, Thomas, furnished suitable and adequate materials and competent coservants. He did not undertake to furnish the scaffolding, on which appellant stood when injured, in an adjusted condition. It was usual and customary for the employees, including appellant, while at work on this structure, to construct and adjust staging out of the materials provided by respondent. It is illogical to compare such temporary staging with some machine which is all adjusted, so that its sufficiency can be ascertained before the employee is called upon to use it. We think that the action at bar falls within the rule announced in the above authorities, that, where competent men are employed to do some work on a structure, upon which scaffolding, or some other appliance to support the workmen, is required—'the employer to furnish the materials, and the employed to construct or adjust the scaffolding or other appliance—the employer is not liable to one of the employees for the careless act of another employee done in the construction, adjustment, or maintenance of the structure or appliance.' "

In *Cheatham v. Hogan*, 50 Wash. 465, 97 Pac. 499, 22 L. R. A. (N. S.) 951, the scaffold which had been originally erected by certain employees for their use in finishing a por-

tion of the building was afterwards adopted and used for other purposes by the owner whose foreman directed the plaintiff to go upon it. An examination of the facts involved in the *Cheatham* case will show that they materially differ from those of the *Metzler* case or the one now before us. In the *Cheatham* case, referring to the *Metzler* case, we said:

"But while this case decides the law correctly on the facts shown, we think it has no bearing on a case like the one at bar. The rule undoubtedly is that a master who retains no supervision over the erection of a scaffold, and gives no direction in regard to it further than to direct that it be constructed, and provides suitable materials for its construction and intrusts the duty to skillful workmen, is not liable to one of the workmen who is injured by the falling of the scaffold because of insufficient construction—this, on the principle that the master is not responsible to the workmen who construct the scaffold nor to one who is engaged in a common employment with them in such a way as to be regarded as their fellow servant, for the sufficiency of their own work. But the rule has no application to a servant who did not construct the scaffold and who is not a fellow servant of the servant who did construct it."

The undisputed evidence now before us shows that the appellant, with the carpenters who built the scaffold, was engaged in such a way as to be regarded as their fellow servant, although he, like the plaintiff in the *Metzler* case, was not present when and where the scaffold was built. In *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888, the doctrine of the *Metzler* case was held inapplicable when the injured plaintiff was a subcontractor for whose use the scaffold had been furnished by the defendant corporation, which had agreed, as a part of the contract of employment, to construct and furnish a safe scaffold for the plaintiff's use. There is an utter absence of evidence here showing, or tending to show, any negligence on the part of the respondent in failing to discharge any duty which it owed the appellant.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8427. Department One. May 13, 1910.]

FIREMAN'S FUND INSURANCE COMPANY, *Respondent*, v. OREGON RAILROAD AND NAVIGATION COMPANY, *Appellant*.[1]

ACTIONS—SPLITTING CAUSE OF ACTION—WAIVER OF OBJECTION—SETTLEMENT. Where a fire insurance company, having paid a loss and taken an assignment of insured's cause of action, brought action for the amount of the policy against the party whose negligence caused the fire, the defendant cannot, after admitting that it had settled with the insured for his loss in excess of the policy, object that there is a splitting of the causes of action and that plaintiff owned only part thereof; since the defect was one of parties plaintiff, which could have been cured by amendment, and the settlement had the same effect, leaving but one cause of action owned entirely by the plaintiff.

RAILROADS—NEGLIGENCE—FIRES—EVIDENCE—SUFFICIENCY. Whether a fire was negligently set by a railroad company is for the jury, where there was testimony that it was customary to clean ashes and cinders from locomotives on its main line and leave the same on the ties a few feet from a depot platform, that the cross ties had been frequently set afire, that the wind was blowing towards the platform, and the fire was first discovered on the platform a few feet from the ties; and it is immaterial that defendant's witnesses testified that no engines were cleaned there that day or night and that engines were not cleaned at that station; the credibility of the witnesses being for the jury.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered December 15, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for negligence. Affirmed.

W. W. Cotton, *R. L. McCroskey*, and *Ralph E. Moody*, for appellant, contended that whatever presumption might have arisen from the evidence of other fires was overcome by the direct evidence that the engines did not cause the fire in question. *Smith v. Northern Pac. R. Co.*, 3 N. D. 17, 53 N. W. 173; *Olmstead v. Oregon Short Line R. Co.*, 27 Utah

[1]Reported in 108 Pac. 770.

515, 76 Pac. 557; *Louisville & Nashville R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Gainesville, J. & S. R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213; *Woodward v. Chicago, M. & St. P. R. Co.*, 145 Fed. 577; *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238, 29 South. 673; *Preece v. Rio Grande W. R. Co.*, 24 Utah 493, 68 Pac. 413; *Creighton v. Chicago, R. I. & P. R. Co.*, 68 Neb. 456, 94 N. W. 527.

Miles Poindexter and *O. C. Moore*, for respondent, to the point that the question as to the origin of the fire was for the jury, cited: *McCullen v. Chicago & N. W. R. Co.*, 101 Fed. 66, 49 L. R. A. 642; *Chenoweth v. Southern Pac. Co.*, 53 Ore. 111, 99 Pac. 86; *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270, 49 N. W. 95; *Hoffman v. Chicago, M. & St. P. R. Co.*, 43 Minn. 334, 45 N. W. 608; *Preece v. Rio Grande W. R. Co.*, 24 Utah 493, 68 Pac. 413.

Gose, J.—One L. M. Lester, the owner of a stock of general merchandise in the town of Winona, insured it with the plaintiff, a corporation engaged in the fire insurance business, in the sum of $2,000, which was less than its value. On August 3, 1907, the property was totally destroyed by fire which, it is alleged, originated through the negligence of the defendant company. The plaintiff paid Lester the amount of the insurance and, by articles of subrogation, took an assignment of his claim against the defendant to the extent of the amount paid. The defendant, at and before the date of the fire, was operating a steam railroad which passed through the town of Winona, where it owned and maintained a depot, depot platforms, and other buildings. The goods were stored in a frame building near the depot. Winona is situated at the junction of defendant's main line of road, which runs easterly and westerly at that point, and its Pleasant Valley road, which runs northerly. The depot and coal house were between the two lines of road and near the switch.

The coal house was some fifty feet northeast of the depot, and the store about the same distance northwest of the coal house. A platform extended around the depot and within about a foot of the ties of each line of road.

About midnight of August 2, 1907, a fire was observed in the depot platform a few feet distant from the main line of track on the south side of the depot, which communicated to the depot and coal house and thence to the building containing the stock of merchandise, completely destroying the store and its contents. The case was tried upon the issues in the second amended complaint and the answer. The negligence charged is that, at the time of the fire, the defendant had stored a large quantity of giant powder, with fulminating explosive caps, in the coal house; that the fire originated from ashes and cinders containing live embers, which the defendant had taken from its engines and deposited on the main line track a few feet from the depot platform; that the fire communicated from the platform and depot to the coal house, causing the giant powder and caps to explode with such violence as to shatter and destroy the building, throwing fire brands upon, and setting fire to, the store building. It is also alleged that, before the commencement of the action, Lester settled with the defendant for the loss he had sustained in excess of the sum paid him by the plaintiff on the policies. A general demurrer to this complaint was overruled. The defendant joined issue on the charges of negligence, admitted that it had settled with Lester, but denied that the settlement was made before the suit was commenced. At the close of the plaintiff's testimony, the defendant challenged its sufficiency and moved for a dismissal of the case, and at the close of all the evidence, it moved for a directed verdict. From a verdict and judgment for $2,000 in favor of the plaintiff, the defendant has appealed.

The first error suggested is, that the respondent did not own the entire cause of action when the suit was commenced; that there was but one wrongful act, and that but one suit

can be maintained; that there being no evidence to support the allegation that Lester settled with the appellant before the commencement of the action, there is a failure of proof, and the case should have been withdrawn from the jury at the close of the respondent's testimony. The following authorities are cited in support of this contention: *Continental Ins. Co. v. Loud & Sons Lumber Co.*, 93 Mich. 139, 53 N. W. 394, 32 Am. St. 494; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.*, 20 Ore. 569, 26 Pac. 857, 23 Am. St. 151; *State Ins. Co. v. Oregon R. & Nav. Co.*, 20 Ore. 563, 26 Pac. 838; *Fireman's Ins. Co. v. Oregon R. & Nav. Co.*, 45 Ore. 53, 76 Pac. 1075, 67 L. R. A. 161; *Wunderlich v. Chicago & N. W. R. Co.*, 93 Wis. 132, 66 N. W. 1144; *Mobile Ins. Co. v. Columbia & G. R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. 725; *Norwich Union Fire Ins. Society v. Standard Oil Co.*, 59 Fed. 984; *Watts v. Southern Bell Tel. & Tel. Co.*, 66 Fed. 453; *Southern R. Co. v. Blunt & Ward*, 165 Fed. 258; *Dietz v. Winehill*, 6 Wash. 109, 32 Pac. 1056; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467. We think the point is not well taken. As we have seen, the answer admits that the appellant has settled with Lester. When that fact was disclosed, it was apparent that the respondent owned the entire cause of action. It is, therefore, not material whether the settlement occurred before or after the action was commenced.

The appellant argues that, when the complaint discloses that all the parties in interest have not united as plaintiffs, a cause of action is not stated. We think it would present a case of a defect of parties plaintiff. If the appellant's view is correct, in the absence of evidence that the settlement was made with Lester before the action was commenced, it was the duty of the court to withdraw the case from the jury; for it is fundamental that, where a cause of action does not exist when the action is commenced, but arises thereafter, that fact cannot be shown either by an amended or supplemental pleading. The office of an amended complaint is to correctly

state a cause of action that existed when the action was commenced, and the office of a supplemental complaint is to state a breach of a legal right connected with the subject of the action and arising after the action was commenced. The record presents a case where the owner of a part of the cause of action became the sole owner during the pendency of the action by the voluntary act of the co-owner and the party against whom the cause of action was asserted.

The cases cited by the appellant all state the rule that a claim or demand arising out of a single transaction, whether resting in contract or tort, cannot be divided into separate and distinct claims so that separate and independent actions can be waged upon the several parts. The reason for the rule is that a party against whom there exists but one liability cannot be vexed by a multiplicity of suits by the same or different parties for the breach of a single duty. Stated in another form, a party cannot be permitted, even in a tort, to split a cause of action and bring separate actions for a part of the claim, or several actions where one would suffice. The complaint discloses but one wrongful act, causing but one loss, creating but one liability, and the record shows that the respondent is the entire owner of that liability. In most of the cases cited, the record discloses that others who were not parties still owned an interest in the cause of action. None of the cases cited present the precise question before us. In *German Fire Ins. Co. v. Bullene, supra*, the court remarked:

"If we could say from the record brought here that this case alone was pending against the insurance company, and that all of the parties in any manner interested in the policy were before the court, so that the rights of each and all of them could be fully determined, it might be that the plaintiff's judgment could be upheld."

At any time before Lester settled he could have been united as a plaintiff, and all the parties in interest would have been before the court. The same thing was accomplished when he

settled with the appellant. To hold that his settlement defeated the right of the respondent to proceed with the case would be sacrificing substance to form. The cause of action was not then split, but was in the respondent in its entirety. *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784, is in point. In that case a married woman commenced an action in her own name to recover for personal injuries. The original complaint did not disclose that she was a married woman, but that fact appeared from her evidence. At the close of her testimony, the adverse party moved for a judgment on the ground that the husband was a necessary party. She was then permitted to amend her complaint and unite her husband as a party plaintiff. On appeal this was urged as error, and it was contended that she had no cause of action and that she could not amend and make her husband, the party having the cause of action, a party plaintiff after the submission of all her evidence. It was held that the wife suing alone could not recover, but that it was not error to permit the amendment.

The respondent offered testimony tending to show that it was the custom of the appellant to clean the ashes and cinders from the engine on the main line track south and southwest of the depot and within a few feet of the platform, and to permit them to remain there; that they had frequently set fire to the cross ties; that the wind was blowing from the southwest at the time of the fire, and that the fire when first observed was in the platform on the south side of the depot a few feet from the main line track. A Mr. Broyles, a watchman and engine cleaner in the employ of the appellant at Winona, testified that no engines were cleaned on the main line or near the depot during the day or evening preceding the fire; and a Mr. Ely, a fireman on the main line, testified that engines were not cleaned at Winona. The appellant's second contention is that the presumption arising from the evidence of appellant's custom of cleaning its engines and the occurrence of other fires at that point, was overcome by its direct evi-

dence, and that it was error for the court to submit that issue to the jury.

We think the point is without merit. If the respondent's evidence is true, the appellant had many times been guilty of the grossest negligence. The question of the veracity and credibility of the appellant's witnesses was one of fact for the jury to determine. It might properly have concluded that, in view of the appellant's past conduct, the course of the wind, and the location of the fire when first observed, the memory of the appellant's witnesses was defective, or that they did not truthfully relate the facts. The fire occurred, as we have stated, in August, 1907. The trial was had in December, 1908. The jury was the tribunal designated by the constitution to try the facts. The circumstances related by the appellant's witnesses were of sufficient cogency to carry the case to the jury upon this issue. *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *McCullen v. Chicago & N. W. R. Co.*, 101 Fed. 66, 49 L. R. A. 642. The authorities cited by the appellant are spark cases, and are so different upon the facts that they are not in point.

The learned trial court correctly instructed the jury upon the law applicable to the case. Finding the record free from error, the judgment is affirmed.

Rudkin, C. J., Fullerton, and Morris, JJ., concur.

Chadwick, J., took no part.

[No. 8424. *En Banc.* May 14, 1910.]

In the Matter of the Estate of PEDER G. STIXRUD, *Deceased*, JOHAN E. STIXRUD *et al.*, *Appellants*, v. THE STATE OF WASHINGTON, *Respondent*.[1]

TREATIES—STATE LAWS—CONFLICT OF LAWS. State laws in conflict with treaties between the United States and foreign countries are held in abeyance during the existence of the treaty.

TREATIES—ALIENS—DISABILITIES. The removal of disabilities of aliens as to the acquisition of property in the several states is a proper subject of treaty between the United States and foreign countries.

TREATIES—CONSTRUCTION—"RESPECTIVE." A treaty providing that the subjects of the contracting parties "in the respective states" may freely dispose of their property, means that the subject may freely dispose of his property within the country of his citizenship; "respective" meaning "pertaining or relating severally to each of those under consideration."

SAME—ALIENS—DESCENT AND DISTRIBUTION—SUCCESSION UNDER TREATY—CONSTRUCTION. The treaty between Norway and Sweden and the United States, providing that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament or otherwise and that their heirs in whatever place they shall reside shall receive the succession, etc., entitles aliens residing in Sweden to take property devised to them by a naturalized citizen of the United States; especially in view of the rule of liberal construction applicable to treaty rights.

SAME—INHERITANCE TAX—RIGHTS OF ALIENS—STATUTES—VALIDITY. Rem & Bal. Code, § 9183, providing for an inheritance tax of twenty-five per cent on all sums passing to collateral relatives who are aliens not residing in the United States, which exceeds the tax upon relatives who are citizens of the United States, violates the treaty between Norway and Sweden and the United States, which provides that the subjects of the contracting parties may freely dispose of their goods and effects by testament and that their heirs in whatever place they shall reside shall receive the succession, exempt from all duty called "droit de detraction" on the part of the government of the two states respectively; since an inheritance tax is an impost or excise on the right to pass the estate and not a tax upon

[1]Reported in 109 Pac. 343.

the property, and the treaty was intended to secure to aliens the right to succeed to property upon the same terms provided by general laws for our own citizens.

TREATIES—CONSTRUCTION—"GOODS AND EFFECTS." A treaty securing to aliens the right to succeed to "goods and effects" embraces real property.

TREATIES—CONSTRUCTION—HEIRS. The treaty between Norway and Sweden and the United States, securing to alien "heirs" the right to "receive the succession" to property, covers the right of succession by testament as well as by operation of law.

FULLERTON and GOSE, JJ., dissenting.

Appeal from an order of the superior court for Thurston county, Mitchell, J., entered May 17, 1908, directing the payment of an inheritance tax by the devisees of a will, upon the final settlement of an estate. Reversed.

S. S. Langland and *Bausman & Kelleher*, for appellants.

J. E. Frost and *T. D. Rockwell*, for respondent.

PARKER, J.—Peder G. Stixrud, a naturalized citizen of the United States and a resident of this state, died at Olympia in January, 1908. He left a will by which he devised all of his property both real and personal to his brother and sister, Johan E. Stixrud and Petronella Stixrud, who were then residents and citizens of Norway. In February, 1908, letters of administration with the will annexed were granted upon the estate of Peder G. Stixrud, and upon the settlement of the estate it was determined by the superior court for Thurston county that the portion of the estate passing to the devisees under the will, after payment of debts and expenses of administration, was subject to an inheritance tax of twenty-five per cent. An order was entered accordingly, directing payment of such inheritance tax computed at this rate. From this order the devisees, Johan E. Stixrud and Petronella Stixrud, have appealed.

The law fixing the amount of the inheritance tax upon property passing by will or inheritance is § 2, Laws 1907,

p. 500 (Rem. & Bal. Code, § 9183), and so far as necessary for us to notice, is as follows:

"The inheritance tax shall be and is to be levied on all estates subject to the operation of this chapter on all sums above the first ten thousand dollars, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or the lineal descendant of an adopted child, one (1) per centum. On all sums not exceeding the first fifty thousand dollars, of three per centum, where such estate passes to collateral heirs to and including the third degree of relationship, . . . Provided, that on all sums passing to or for the benefit of collateral relatives or strangers of the blood, who are aliens not residing in the United States, a tax of twenty-five per centum shall be levied and collected."

Appellants being collateral heirs of the deceased within the third degree of relationship, it is plain that the inheritance tax upon the property they take under this will would only be three per cent, since the amount thereof is less than $50,000, unless the rate of the tax is controlled by the proviso fixing the rate at 25 per cent where property passes to collateral relatives who are aliens not residing in the United States.

Learned counsel for appellants contend that the property left to them by their deceased brother is liable to pay an inheritance tax of only three per cent, the same as if they were not aliens residing out of the United States at the time of their brother's death, by virtue of article 6 of the Treaty of Amity and Commerce of 1783 as revived by article 17 of the Treaty of Commerce of Navigation of 1827, still existing between Norway and Sweden and the United States, which provides:

"The subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato* either in person or by their attorney without having occasion

to take out letters of naturalization. These inheritances as well as the capitals and effects which the subjects of the two parties in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempt from all duty called '*droit de detraction*' on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published, in Sweden against immigration, or which may hereafter be published, which shall remain in full force and vigor. The United States on their part, or any of them shall be at liberty to make respecting this matter, such laws as they think proper." 7 Fed. Stats. Ann., pp. 828, 835.

By the second clause of article 6 of the constitution of the United States it is declared:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It has become the settled law of this country that when a law of a state comes in conflict with the provisions of a treaty, entered into by the United States with a foreign country relating to a subject-matter within the treaty-making power, such law must give way, and its application to the subject-matter covered by the treaty held in abeyance during the existence of the treaty. In *Hauenstein v. Lynham*, 100 U. S. 483, 490, Justice Swayne, speaking for the court, said:

"It must always be borne in mind that the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet. 242; *Foster & Elam v. Neilson*, 2 id. 253; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 Elliot's Constitu-

tional Debates, 231; *The People, etc. v. Gerke & Clark*, 5 Cal. 381."

It is equally well settled that the matter of removing the disability of aliens, in order that they may have the same rights as citizens to acquire and hold property in the states of the Union, is a proper subject of treaty regulation. Justice Field, in speaking for the supreme court of the United States in *Geofroy v. Riggs*, 133 U. S. 258, 266, said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries."

The state courts, at the present day, have uniformly given their assent to this doctrine. *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Dockstader v. Kershaw*, 4 Penn. (Del.) 398; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; *Opel v. Shoup*, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583; *Yeaker's Heirs v. Yeaker's Heirs*, 4 Met. (Ky.) 33, 81 Am. Dec. 530; *Baker v. Shy*, 9 Heisk (Tenn.) 85; *Succession of Rabasse*, 47 La. Ann. 1452, 17 South. 867, 49 Am. St. 433; *Kull v. Kull*, 37 Hun 476.

These firmly established principles are not denied by learned counsel for the state, but they contend that there is nothing in this treaty to prevent a sovereign state of the Union from collecting an inheritance tax from alien heirs or devisees of a citizen of the United States, upon property in the United States; that this article was adopted for the protection of the citizens of Sweden and Norway residing in the United States and citizens of the United States residing in Sweden and Norway; that it does not seem possible

that our government would think it necessary to make a treaty with a foreign country for the protection and benefit of a citizen's property at home, he being protected and subject only to the laws of his country. These contentions are apparently based on the theory that the paramount consideration in the interpretation of this treaty is the right of the deceased to dispose of his property by testament or have it pass by descent to his heirs, rather than the right of his heirs to receive the succession. In other words, the argument seems to be that the treaty is designed to protect the rights of the deceased, rather than those who take from him; and hence, can have no application to the property of a deceased citizen passing to a citizen of the other country. Of course one country would not be interested in the succession of property merely between citizens of the other; but it would be interested in the succession of property passing from a citizen of one country to citizens of the other, and clearly the power to dispose of property by testament by a citizen of the country where he resides and where his property is situated would effect the right of his devisee, a citizen of the other country, to receive such property. Under the same circumstances would each country be interested in the right of its citizens to inherit from citizens of the other.

The principle authority relied upon by learned counsel in support of this argument is the case of *Frederickson v. Louisiana*, 23 How. 445. That case was brought into the supreme court of the United States from the supreme court of Louisiana by writ of error. There was involved a ten per cent inheritance tax levied by the state upon so much of the property of a deceased naturalized citizen of the United States, residing at the time of his death in Louisiana, as passed by his will to residents and subjects of the Kingdom of Wurtemberg. The statute under which the state claimed the tax, the treaty provisions relied upon by the legatees to avoid the tax, and the court's views touching their rights,

will be best understood by the following quotation from the decision, commencing on page 446:

"By a statute of Louisiana, it is provided that 'each and every person, not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state, or elsewhere, shall pay a tax of ten per cent on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession.' The claim of the state of Louisiana was resisted in the District Court, on the ground that it is contrary to the provisions of the third article of the convention between the United States of America and his Majesty the King of Wurtemberg, of the 10th April, 1844. That article is, that 'The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.' This court, in *Mager v. Grima*, 8 How. S. C. R., 490, decided that the act of the legislature of Louisiana was nothing more than the exercise of the power which every state or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. The case before the district court in Louisiana concerned the distribution of the succession of a citizen of that state, and of property situated there. The act of the legislature under review does not make any discrimination between citizens of the state and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax. *The State v. Poydras*, 9 La. Ann. R., 165; therefore, if this article of the treaty comprised the succession of a citizen of

Louisiana, the complaint of the foreign legatees would not be justified. They are subject to 'only such duties as are exacted from citizens of Louisiana under the same circumstances.' But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty."

There are two important particulars in which that case differs from the one before us. *First*, the treaty there involved provided that, "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property *within the states of the other* by testament," etc., while the treaty here involved provides that "The subjects of the contracting parties *in the respective states* may freely dispose of their goods and effects by testament," etc. *Second*, the statute of Louisiana, there involved, did not make any discrimination between the citizens of the state and aliens in the same circumstances. A citizen of Louisiana domiciled abroad was subject to the tax. The statute here involved imposes a tax of twenty-five per cent on property passing to collateral relatives who are aliens not residing in the United States, and at the same time imposes a tax of only three per cent on property passing to citizens under the same circumstances; thus clearly discriminating between citizens residing abroad and aliens residing abroad. The persons who may freely dispose of their goods and

effects under this treaty are the subjects of the contracting parties "In the respective states." Clearly, these words must at least mean that the subject may freely dispose of his property by testament within the country of his citizenship. The word "respective" is defined by the Standard Dictionary as, "pertaining or relating severally to each of those under consideration; several; particular; as, they went to their respective homes." The more strictly we construe this language, the more certain does it seem applicable to the facts in this case, in favor of the rights claimed by appellants, as against the contention of the state based upon the fact that the deceased was a citizen of the United States.

Turning now to the right of appellants to receive the succession, if, indeed, such right can be considered in this case apart from the right of the deceased to give "by testament," we find the express terms of the treaty not only guaranteeing to them the right to receive, but guaranteeing to them in so many words, the right to receive "In whatever place they shall reside." And then, apparently for the purpose of removing all possible doubt as to the effect of their want of citizenship in the country in which the property may be situated, upon their right to receive, the treaty further expressly provides that they shall receive "without having any occasion to take out letters of naturalization." Thus indicating an intention to give them the same right to receive as if they were citizens.

In the case of *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. 201, 36 Am. St. 432, 19 L. R. A. 90, the court had under consideration article 7 of the treaty of 1827 between the United States and Bremen, providing as follows:

"The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and

dispose of the same at their will, paying such dues only as the inhabitants of the country, wherein said goods are, shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they think proper, and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the governments of the respective states."

Referring to the right of alien heirs and representatives of citizens of the United States under this treaty provision, Justice Magruder, speaking for the court, said:

"The second clause can be construed to mean, that the representatives or heirs of American citizens being citizens of Bremen shall succeed to personal goods. It follows that, by the terms of the third clause, the heirs of American citizens who are citizens of Bremen shall have the prescribed term of three years to dispose of real estate, etc. The appellees are, therefore, entitled, under said article 7 of the treaty, to the privilege of selling the interests in the land in controversy, which they would have inherited from the deceased George Ludwig Schultze under the laws of Illinois but for their alienage, and of removing such proceeds of sale, providing they do so within three years."

It seems to us that the terms of that treaty are not as clear in securing rights to alien heirs of citizens of the United States as the treaty involved in the case before us; yet, the liberal rule of construction applicable to treaty rights induced the court in that case to regard the United States citizenship of the deceased as having no effect upon the rights of his alien representatives to succeed to property left by him in this country. The following authorities, involving aliens taking by will or inheritance from citizens of the United States, may be cited as lending additional support to this view, though the right to take does not appear to have been challenged upon the ground of the citizenship of the deceased. *Jost v. Jost*, 1 Mackey (D. C.) 487; *Geofroy v.*

Riggs, Kull v. Kull, and *Opel v. Shoup, supra; Adams v. Akerlund,* 168 Ill. 632, 48 N. E. 454.

In the case last cited, the court held that subjects and residents of Sweden, who were heirs of a citizen of the United States residing in Illinois at the time of his death, inherited property of the deceased situated in Illinois, by virtue of the terms of the same treaty which is here involved. We are lead to conclude that the rights of appellants here claimed are in no way affected by the mere fact that their deceased brother was, at the time of his death, a citizen of the United States, and that the property claimed is in the state of Washington.

We are next confronted with the question, Does this charge of twenty-five per cent as an inheritance tax upon the property passing to appellants under this will impair the rights guaranteed to them by the terms of this treaty? A tax of this nature is not a tax upon property, but is a charge upon the right or privilege of receiving it. The nature of this tax and the legal basis for its support is well stated by Justice Brown, speaking for the supreme court of the United States in *United States v. Perkins,* 163 U. S. 625, 628, as follows:

"Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

"In this view, the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon

the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. This was the view taken of a similar tax by the Court of Appeals of Maryland in *State v. Dalrymple*, 70 Maryland, 294, 299, in which the court observed: 'Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property . . . to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.' "

This view of the nature of an inheritance tax has been recognized by this court in *State v. Clark*, 30 Wash. 439, 71 Pac. 20, where at page 445, it was said by Chief Justice Reavis: "It is an impost or excise on the right to pass the estate and the privilege of the devisee to take." *Plumber v. Coler*, 178 U. S. 115, 125; *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 41 Am. St. 569, 25 L. R. A. 632; *State ex rel. Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170; *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207.

It is upon this theory that such a tax is held not to be in violation of the usual constitutional provisions requiring uniformity of taxation upon property. It is, therefore, apparent that the levy of a tax of this nature has the direct effect of impairing the right or privilege of receiving prop-

erty by testament or inheritance; and in that manner this tax impairs the right of these appellants to take, since it withholds from them twenty-five per cent of the property they would be entitled to were they citizens of the United States and this law did not exist. It logically follows that they are deprived of a right accorded them by the terms of this treaty, unless it can be said that this tax does not deprive them of their treaty rights because it is an exercise of the power of taxation by a sovereign state, and that the treaty contemplates the exercise of such power by each of the contracting parties.

It may be conceded that there is no limit to the taxing power of the sovereign, and that the right or privilege of succession to property upon the death of its owner may be given or withheld by the state at its pleasure. Indeed, the concluding words of article 6 of this treaty, probably with unnecessary caution, reserves to the United States and each of them the "liberty to make, respecting the matter, such laws as they think proper." But surely this power cannot be rightfully exercised in such manner as to destroy the very rights the treaty was plainly designed to secure. It, of course, cannot be seriously contended that citizens of Sweden and Norway are, by the terms of this treaty, accorded any greater rights in their succession to property than the general laws of the states of the Union may accord to citizens of the United States. The laws of the several states would undoubtedly control those rights even though no reservation to that effect was in the treaty. To whatever extent the right or privilege of a citizen of the United States to take property by testament or inheritance is impaired by our own laws, whether such laws relate to taxation or succession, to that extent will the rights of the citizens of Norway and Sweden be impaired without violating the terms or spirit of this treaty.

The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and

effects by testament, and the right to receive the succession, must mean the right to so give and receive as such right may be defined by the general laws in force in the country where the property is situated. It could not mean otherwise, because there is no law to which we may turn, or which the contracting parties could have in view, in the making of the treaty, defining testamentary and succession rights, save the laws of the respective countries. There is no universal or international law of succession to property. In order then to give force and effect to the treaty, and avoid the destruction of the very end it was plainly intended to accomplish, we must conclude that the testamentary and inheritance rights secured thereby are such that they cannot be impaired, except as such rights and privileges of citizens may be impaired by the laws of their own country. The enforcement of a law which would have the effect of burdening the succession of property passing to the citizens of Sweden and Norway, greater than that imposed upon property passing to our own citizens, would, in our opinion, be a plain violation of the rights secured by this treaty. The treaty must be held to mean that so far as the right of succession to property from deceased persons is concerned, the citizens of each country stand on an equal footing. Otherwise its evident intent and purpose, touching the matters here involved, might be rendered of no effect by the passage and enforcement of laws discriminating against citizens of other countries, under the guise of exercising the taxing power or the power to control the succession of property. If these appellants can be discriminated against by withholding from them in the form of taxation a larger portion of the property left them than can be withheld from others under the same circumstances, then, by the same method of discrimination, their right of succession to the property may be entirely destroyed, by taking all of it; even though others may not have their privilege of succession thus impaired in the least. We think this treaty was intended to secure, and does secure, to the citizens

of Sweden and Norway the right to succeed to property left them by will or inheritance, upon the same terms as such rights of our own citizens may be defined by law. These are the rights, and the law defining them, which must have been in view in the making of the treaty, rather than possible discriminating laws affecting the rights of aliens different from citizens; for to concede the right to make and enforce such laws is to concede the right to nullify the provisions of the treaty. This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and Federal, in such cases. In *Geofroy v. Riggs*, *supra*, at page 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 483, 487."

See, also, 28 Am. & Eng. Ency. Law (2d ed.), 490; Devlin, Treaty Power, §§ 116, 125.

It has been noticed that the deceased left by his will to these appellants both real and personal property. The use of the words "goods and effects" only, to designate the property the treaty is applicable to, might give rise to argument as to whether or not these words include real property. In the case of *Adams v. Akerlund*, *supra*, these words in this same treaty were under consideration, where it was contended that real property was not included by them. The court, however, in a very able and exhaustive opinion,

held that real property was included. 1 Bouvier's Law Dictionary (Rawle's Rev.), 635; *University v. Miller*, 3 Dev. (N. C.) 188. No contention is here made upon this point; but in view of the fact that we are here dealing with real as well as personal property, and our decision necessarily has the effect of applying the treaty provision to real as well as to personal property, we deem it not out of place to notice this possible contention.

We have made particular reference to the language of the treaty relating to the rights of those who may receive. It will be noticed that they are described therein by the word "heirs." This word, of course, has its technical common law meaning, restricting it to those who take by inheritance only; while in the civil law it applies to all persons who are called to the succession, whether by the act of the party or by operation of law. 1 Bouvier's Law Dictionary (Rawle's Rev.), 941. There does not appear to be any reason for here attributing to it the technical meaning of either of these systems of law in preference to the other, since it is here used by countries in one of which the common law prevails, and in the other of which the civil law prevails. 1 Bouvier's Law Dictionary (Rawle's Rev.), 330, 370. We are of the opinion that the words, "their heirs . . . shall receive the succession," refers to the right of succession of those who receive by testament as well as those who receive by operation of law, in view of the other provision of the article, and that the effect of the word "heirs" should not be measured by any technical rules. *Geofroy v. Riggs*, *supra;* 21 Cyc. 420; *In re White's Estate*, 42 Wash. 360, 84 Pac. 831. We notice this matter of the meaning of the word "heirs" because of the particular provisions of the treaty defining the rights of those so designated.

The contention of learned counsel for appellants that this inheritance tax is unconstitutional in so far as it imposes upon aliens not residing in the United States a greater tax than upon citizens, in view of certain provisions of our state

constitution, presents a question which does not require our attention at this time. We are of the opinion that article 6 of the treaty before us, secures to appellants the right of succession to the property left them by the will of their deceased brother, upon the same terms as are accorded to our own citizens; and in so far as the law burdens them with a greater tax than it does our own citizens, it must be held in abeyance and yield to the provisions of this treaty.

We conclude that the order of the superior court should be reversed, with instructions to fix the amount of the inheritance tax at a rate not inconsistent with the views herein expressed. It is so ordered.

RUDKIN, C. J., DUNBAR, CHADWICK, CROW, MORRIS, and MOUNT, JJ., concur.

FULLERTON and GOSE, JJ., dissent.

[No. 8267. Department Two. May 16, 1910.]

THOMAS PITT *et al.*, *Appellants*, v. A. C. LITTLE, *Respondent*.[1]

EVIDENCE—PRESUMPTIONS—FOREIGN LAWS. In an action on a promissory note executed in a foreign country, it will be presumed, where nothing appears to the contrary, that the laws of that country were the same as our own.

BILLS AND NOTES—CONSIDERATION. The debt of a corporation and an extension of time for payment is sufficient consideration for the execution of the personal note of the president of the corporation.

BILLS AND NOTES—DEFENSES—COLLATERAL AGREEMENT—EVIDENCE—TO VARY WRITING. The maker of a promissory note upon sufficient consideration cannot, in the absence of fraud or mistake, set up any collateral agreement exempting him from liability.

ALTERATION OF INSTRUMENTS—MATERIALITY. Memoranda or notations upon a promissory note which did not change the date, sum payable, time of payment, parties, medium or place of payment, and which did not alter the note in any respect, do not constitute a material alteration avoiding payment.

[1]Reported in 108 Pac. 941.

BILLS AND NOTES—RELEASE—BY PAROL—"RENUNCIATION." Under Rem. & Bal. Code, § 3512, requiring the "renunciation" of rights against the maker of a promissory note to be in writing unless the note is delivered up, the maker cannot show an oral agreement to release him from liability when the note was not surrendered, as "renunciation" is used in the statute in the sense of "release."

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered January 5, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Reversed.

H. W. B. Hewen, for appellants.

Welsh, Welsh & O'Phelan, for respondent.

CROW, J.—This action was commenced by Thomas Pitt and A. H. Peterson, copartners as Pitt & Peterson, against A. C. Little, to recover an indebtedness claimed to be due on a promissory note executed and delivered by the defendant. The jury returned a verdict in favor of the defendant, and the plaintiffs have appealed from the final judgment entered thereon.

The appellants' controlling contention is that the trial court erred in refusing to direct a verdict and judgment in their favor. The original note read as follows:

"Due Oct. 1st-03. $206.39-100.

"Victoria, B. C., Febr. 1st 1903.

"Eight months after date I promise to pay to the order of Messrs. Pitt & Peterson, Duncan's Station Two Hundred & Six 39-100 dollars at interest 8 per cent per annum. Payable at the Canadian Bank of Commerce, Victoria, B. C. Value received.

"No.——— A. C. LITTLE.

"Given on act. of International M. & D. Co."

Although it appears upon the face of the note that it was executed in British Columbia, no contention or claim predicated upon British Columbia laws has been made. We will, therefore, consider the laws of this state only, it being presumed, in the absence of any pleading or evidence to the con-

trary, that foreign laws are the same. *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

The complaint is in usual form. The respondent, answering, admitted the execution and delivery of the note, but denied that he had promised to pay the appellants $206.39, or any other sum. For his first affirmative defense he, in substance, alleged that some time prior to February 1, 1903, the International Mining & Development Company, a corporation organized and existing under the laws of the state of Washington, was indebted to the appellants in the sum of $206.39; that on said date respondent, at their request, signed and delivered the note; that he himself was not indebted to them in any sum; that the note was without consideration; that he did not receive anything of value therefor, and that prior and subsequent to its execution the appellants agreed with him that they would not attempt to collect the note from him, but would look solely to the International Mining & Development Company for payment. For a further affirmative defense the respondent alleged:

"That after the execution of said note and sometime during the year 1903, the exact date being to defendant unknown, in the city of Victoria, British Columbia, the plaintiffs and each of them, for a valuable consideration, released defendant from all liability, on said promissory note, and informed the defendant that they would look to the International Mining & Development Co., solely and exclusively for the payment of said note. Which said release was oral and was made in consideration of the said defendant promising and agreeing with the plaintiffs to use his influence with and endeavor to persuade the International Mining & Development Co., and one T. J. Reinhart and other persons, whose names are at this time, unknown to defendant, and who were indebted to plaintiffs, to pay to plaintiffs their said indebtedness, and defendant alleges that thereafter and in compliance with said agreement, he did use his influence with and endeavor to persuade the said International Mining & Development Company and said T. J. Reinhart

and said other persons, to pay plaintiffs the amount of their said indebtedness, to plaintiffs."

The evidence fails to sustain respondent's contention that the note was without consideration. It appears that the International Mining & Development Company, of which the respondent was president, was indebted to the appellants in the sum of $206.39 for merchandise sold; that the appellants endeavored to collect the same; that respondent executed and delivered the note in consideration of such debt and an extension of time for payment, which appellants granted by accepting the note. The debt of the corporation and the extension of time constituted a sufficient consideration. A negotiable promissory note is not void for want of consideration, if given for the matured debt of a third party, the time of payment being thereby extended. Daniel, Negotiable Instruments (5th ed.), § 185; *Galena Nat. Bank v. Ripley*, 55 Wash. 615, 104 Pac. 807; *Mechanics & Farmers' Bank of Albany v. Wixson*, 42 N. Y. 438.

The respondent did not plead any fraudulent act on the part of the appellants by which he was wrongfully induced to execute the note, nor did he allege any mistake upon his own part. He not only admitted the execution of the note, but his own evidence shows that his acts were intentional and voluntary. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, we said:

"It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation."

The respondent has failed to make any showing that the note was without consideration, and he cannot be permitted to predicate a defense on any alleged collateral agreement exempting him from liability.

Respondent's next contention was that the note had been

avoided by reason of material alterations appearing upon its face, made after its execution and without his knowledge or consent. The alleged alterations are immaterial memoranda or notations. They made no change in the date, the sum payable either principal or interest, the time of payment, the number or relation of the parties, or the medium or currency in which payment was to be made. Nor does any other alteration appear which added a place of payment where none was specified, or which altered the effect of the note in any respect. The note was not avoided by alteration. Rem. & Bal. Code, §§ 3514 and 3515.

By his last defense the respondent, in substance, contended that the appellants had released him from personal liability, and he introduced parol evidence to sustain this contention. Section 3512, Rem. & Bal. Code, being § 122 of the negotiable instruments act of 1899 (Laws 1899, p. 361), reads as follows:

"The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

In *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, construing this section of the statute, we said:

"This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and if 'renunciation' is used therein in the sense of 'release,' there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argues that the word is used in a sense different from that of release, and that while a renunciation must be by a writing, a release may be proved by parol. But we cannot think the statute permits of this distinction. The words, 'The holder may expressly

renounce his rights against any party to the instrument,' must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning."

There was no written evidence of any renunciation or release of their claim by the appellants, nor had the note been surrendered to respondent. Construing all of the evidence most favorably to the respondent, we find that he has failed to sustain any defense to the note, the execution and delivery of which he has admitted.

The trial court erred in denying appellants' motion for a directed verdict. The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of the appellants.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8239. Department One. May 18, 1910.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. RAILROAD COMMISSION OF WASHINGTON, *Respondent*.[1]

CONSTITUTIONAL LAW—DUE PROCESS—RAILROADS—REGULATION—REQUIRING SPUR TRACKS. An order of the railroad commission compelling a railroad company to construct and operate a spur track from its main line to a private sawmill, without compensation, is a taking of private property without due process of law, in contravention of the fourteenth amendment to the Federal constitution.

FULLERTON, J., dissenting.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 18, 1909, sustaining an order of the railroad commission requiring the construction and operation of a spur track to facilitate the shipment of timber products. Reversed.

B. S. Grosscup (*Geo. T. Reid*, of counsel), for appellant.

[1]Reported in 108 Pac. 938.

The Attorney General, and *W. V. Tanner, Assistant*, for respondent, contended that those who devote their property to the uses of a common carrier do so subject to governmental regulation under the police power, which is not controlled by limitations upon the right of eminent domain. 22 Am. & Eng. Ency. Law (2d ed.), 916; Sedgwick, St. and Const. Law, 434-437; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 19; *Mugler v. Kansas*, 123 U. S. 623, 668; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Lake Shore & Michigan S. R. Co. v. Ohio*, 173 U. S. 285, 300; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701. The order of a railroad commission compelling the installation of spur tracks is not a taking of private property without due process of law. *Corporation Commissioners v. Seaboard Air Line R. Co.*, 140 N. C. 239, 52 S. E. 941; *State v. Missouri Pac. R. Co.*, 81 Neb. 15, 115 N. W. 614; *State ex rel. Farmers' Elevator Co. v. Missouri Pac. R. Co.*, 81 Neb. 174, 115 N. W. 757; *State ex rel. Mt. Hope Coal etc. Co. v. White Oak R. Co.*, 65 W. Va. 15, 64 S. E. 630; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *Harp v. Choctaw etc. R. Co.*, 118 Fed. 169. The denial of an industrial spur to one shipper and the installation of such spurs for others constitutes unjust discrimination. Rem. & Bal. Code, § 8641; *Corporation Commission v. Railroad, State ex rel. Farmers' Elevator Co. v. Missouri Pac. R. Co.*, and *State ex rel. Mt. Hope Coal Co. v. White Oak R. Co., supra; Interstate Stock-Yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472; *Farwell Farmers' Warehouse Ass'n v. Minneapolis, St. P. etc. R. Co.*, 55 Minn. 8, 56 N. W. 248; *State v. Chicago, M. & St. P. R. Co.*, 36 Minn. 402, 31 N. W. 365; *Agee & Co. v. Louisville & N. R. Co.*, 142 Ala. 344, 37 South. 680; *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.*, 23 Ky. Law 1318, 64 S. W. 969; *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218, 73 Pac. 388. The order of the railroad commis-

sion is not arbitrary or unreasonable. *Northern Pac. R. Co. v. Railroad Commission*, 57 Wash. 134, 106 Pac. 611; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713; *Morgan's etc. R. Co. v. Railroad Commission*, 109 La. 247, 33 South. 214; *Minneapolis, St. Paul etc. R. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905.

Gose, J.—This appeal is prosecuted from a judgment of the superior court of Pierce county, affirming an order of the railroad commission requiring the appellant to construct and operate a spur track from its main line road to the sawmill of one H. A. Burnham. The appellant owns and operates a line of railroad extending from Tacoma easterly and southeasterly through the state, and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about four miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations and about three hundred feet from the appellant's main line track. He manufactures about six carloads per week of lumber and other sawed timbers, for shipment over appellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about two and a half miles by wagon road, at an expense of about $40 a carload for hauling and loading. With a spur track to his mill he could put his products aboard the car for about five dollars per carload. He has demanded of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track, and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand.

Upon a complaint alleging these facts, and also alleging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the opera-

tion of trains, the case was heard before the railroad commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines. The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. A compliance with the order would require switching to the extent of about a mile, and would consume from a quarter to a half hour every time a car was taken to or from the mill.

The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the Federal constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820. A railroad is a public highway and, as such, is subject to regulation, but the regulation must be promotive of the public interest. Notwithstanding the fact that it is a public highway its property is private. In *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, speaking of the fourteenth amendment, it is said:

"It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. The difficulty, and perhaps impossibility, was referred to by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the

cases presented for decision shall require, with the reasoning on which such decisions may be founded.' "

It is true that railroad companies may be required to fence their tracks, establish proper crossings at points of intersection with public roads, patrol their tracks at thickly populated points, establish depots and stations, provide suitable connection with intersecting lines, adopt suitable safety appliances for the coupling of cars, properly light and heat their cars and depots, and many other things which touch the public business. The sawmill of Mr. Burnham, while an important industry, is no more a public business than a flouring mill, a dairy, a farm, a livery barn, or a manufacturing plant of any other character or description.

The case at bar falls squarely within the principle announced and applied in *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403. In that case the supreme court of the state of Nebraska had awarded a writ of mandamus to compel the railway company to comply with an order of the state board of transportation, which directed the company to grant to certain private persons the right and privilege of erecting an elevator upon the grounds of the railway company at one of its stations. The complaint upon which the order was based recited that the elevator would be used to store the cereal products of the farms and leaseholds of the complainants as well as the products of other neighboring farms. Upon a writ of error to review the judgment, the court said:

"The order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the Fourteenth article of Amendment of the Constitution of the United States."

In *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*,

32 Wash. 218, 73 Pac. 388, a mandamus proceeding to require the railroad company to extend its track two hundred and fifty feet to a grain warehouse, to afford it loading facilities, this court said:

"Under any view of the requirements of the statute, it certainly cannot be contended that appellant could have been required to build a track over land it did not own, or that it was under the duty to go out and buy a right of way for that purpose, . . ."

In that case the record shows that a deed to the right of way for the extension of the track was tendered the railroad company at the time of the trial. In *Harp v. Choctaw O. & G. R. Co.*, 118 Fed. 169, the railroad company had for a time permitted the owners of coal mines to load their coal from wagons onto the cars on its commercial switches. It was insisted that, if this method were discontinued, it was the duty of the company to put in a spur track for the benefit of the mine owner. In considering that question the court said:

"It must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen operating the coal mine on his own account."

In *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196, decided by the United States supreme court since the case at bar was argued, a statute providing that:

"Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and

in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants, adjacent to their right of way, for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels;"

and making railroads liable for a fine for failing to obey the command of this statute was held unconstitutional. The case arose out of two suits based upon the statute. The first was brought by the state of Nebraska to recover a fine of $500. The second was brought on the relation of the interested party, to compel the extension of a side track and the granting of shipping facilities, the railroad company having refused an application for a site for an elevator on its right of way. *State v. Missouri Pac. R. Co.*, 81 Neb. 15, 115 N. W. 614, and *State ex rel. Farmers' Elevator Co. v. Missouri Pac. R. Co.*, 81 Neb. 174, 115 N. W. 757, were reversed, the court saying:

"We are of the opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires."

The same principle is announced in *Chicago B. & Q. R. Co. v. State ex rel. State Board of Transportation*, 50 Neb. 399, 69 N. W. 955, and *State v. Chicago M. & St. P. R. Co.*, 36 Minn. 402, 31 N. W. 365.

However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the Federal constitution, as construed by the highest Federal court and by this court as well, presents an insuperable barrier against compelling such accommodations.

The contention of the attorney general that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are

persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the Federal constitution.

The judgment is reversed, with directions to dismiss the petition.

RUDKIN, C. J., CHADWICK, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—Since the supreme court of the United States holds that a railroad company cannot be compelled without compensation to afford facilities to a private shipper other than it offers at its general public stations, I am constrained to concur in the judgment the majority have directed to be entered in this case. I cannot concur, however, in all that is said in the opinion. I cannot concur in the view that to compel a railway company to stop at points other than its public stations and take on for carriage the property of a private shipper is taking its property for the private use of another in violation of the due process of law clauses in the state and Federal constitutions. As I understand it, the principal purpose for which a railroad is constructed is to carry from one point to another the private property of the individual; that it is for this purpose it has its existence and is given the vast powers and rights it possesses. This function then the state may compel it to fulfill. If, therefore, its public stations do not afford an adequate facility for the shipment of the property of a particular individual, I know of no legal reason why the company cannot be compelled, on due compensation, to furnish that particular individual with additional facilities, even to the extent of putting in an additional side track for him. For this reason I dissent from the holding that to do so is to take private property for a private use.

[No. 8584. Department One. May 18, 1910.]

THE CITY OF ABERDEEN, *Respondent*, v. LYTLE LOGGING & MERCANTILE COMPANY, *Appellant*.[1]

WATERS AND WATER COURSES—POLLUTION OF STREAM—RIPARIAN RIGHTS—EQUITY—INJUNCTION. Equity will restrain a logging company from polluting a stream constituting a city water supply, by the use of a bridge which had settled into the water, where the bridge could be raised and the injury obviated at slight expense, even though the logging operations were carried on in the usual manner; since (1) each riparian owner's rights is qualified by the reasonable rights of the other, and (2) the pollution was due to improper use of the land and not of the waters of the stream.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 26, 1909, upon findings in favor of the plaintiff, in an action to enjoin interference with the waters of a stream, after a trial on the merits before the court without a jury. Affirmed.

W. H. Abel and *C. W. Hodgdon*, for appellant.

Austin M. Wade, for respondent.

CHADWICK, J.—The present source of water supply of the city of Aberdeen is Stewart creek, upon the banks of which a pumping station has been maintained by the city for the past fifteen years. Stewart creek flows across section 31, township 18, north, range nine west, Willamette Meridian. A tributary rises and flows into the creek on the said section. Section 31 is owned by the Lytle Logging Company, a corporation, and it is complained that it has located and is maintaining its camps and is logging the lands, so that quantities of brush, debris, and surface soil are dragged into the waters of Stewart creek, so that they are polluted and contaminated and rendered unfit for domestic use.

The trial court found that, in the prosecution of its log-

[1]Reported in 108 Pac. 945.

ging operations, the company has constructed a logging road, or fore-and-aft bridge or pole road, across a portion of section 31 and across Stewart creek; that the bridge is so constructed that it rests in the waters of, and in the bed of, the creek, and that the injury complained of has resulted because of the improper construction and use of the logging road. The court also found that the defendant was logging in the way such operations are usually carried on in Western Washington, and in a reasonably prudent and careful manner. The court decreed that the logging company be perpetually enjoined and prohibited from hauling or transporting any logs across Stewart creek, and prohibited from hauling or transporting logs across the fore-and-aft bridge maintained across the creek, until the bridge be reconstructed in such way that the bridge will not interfere with the natural flow of the creek, the court having theretofore found that the bridge could be raised about one foot above the water at a very slight expense. Defendant has appealed.

The only question in the case is stated by counsel for appellant as follows:

"Whether, since appellant is carrying on its logging operations in an ordinarily prudent and careful manner, it can be enjoined at the suit of the city on account of the slight incidental disturbance of the waters of Stewart creek from which the city derives its water supply; . . . the determination of this case depends upon whether our use of the stream is reasonable."

Both parties, so far as it is made to appear, are rightfully occupying the land, and if the court's findings could be limited to the one, holding that the logging operations were carried on in a reasonably prudent and careful manner, nothing would be left for our consideration. But the court having also found that the defendant had, after the issuance of the restraining order, hauled some of its heavy equipment over the fore-and-aft bridge, causing the bridge to settle and lower into the creek; that if used in its present condition

the water would be made muddy and somewhat polluted, and that to obviate this possibility the bridge should be elevated, we think a case is presented calling for the equitable interference of the court, opening as it were the legal question whether one of two joint or common occupants of the land can so use the stream as to annoy or injure the other, when it can reasonably be avoided.

The cases cited by appellant go no further than to hold that every man had the right to the natural use and enjoyment of his property, and if, as an incident to that use and enjoyment, he does not unreasonably trespass upon the rights of others, no action will lie. But it does not follow that others may not compel a reasonable regulation of that use. Such mischief as appellant is likely to feel from the insistence of respondent that its water supply be kept pure and clear can be obviated at an expense so trifling that compliance with the order of the court cannot be called a hardship or work a loss of property rights. On the other hand, any obstruction tending to the pollution of the waters of Stewart creek might work irreparable mischief, reaching far beyond the inconvenience of the landowner. Even in the case of *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. 72, 28 Am. St. 245, 13 L. R. A. 117, cited by counsel, an exception to the general rule that the pollution of a stream by a riparian owner could not be restrained where it was a natural incident to the proper and reasonable use, is admitted where there is a necessity founded upon "grave public considerations." The whole subject is covered by the case of *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, where this court said:

"Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others."

We have met this case, as it has been presented to us, upon

the theory of riparian ownership. But it seems to us that the judgment of the lower court may be sustained upon the further ground, that the use of the stream by the logging company is not in any way involved, within the meaning of the authorities cited, or in any way necessary to the logging operations of appellant. That is to say, the fouling of the water results not from the use of the stream for any purposes incident to the ownership of the land, but from the use of the land itself; and this being so, the condition put upon appellant by the court—that is, that it raise its bridge one foot above the flowing water—is a reasonable regulation in favor of the one who is, and who alone is, using the waters of Stewart creek. In other words, appellant is using the land and not the water, and its pollution is not a necessary incident to the business it is carrying on.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8575. Department One. May 18, 1910.]

CLARENCE CUNNINGHAM, *Respondent*, v. INDEPENDENCE CONSOLIDATED MINING COMPANY, LIMITED, *et al.*, *Appellants*.[1]

CORPORATIONS — STOCK — SUBSCRIPTIONS—CONSTRUCTION—FREE OF ASSESSMENT. An agreement that a stockholder was to receive 100,000 shares of stock "free of assessment" until stock held by other stockholders had been paid for in full, does not mean "free from any charge or payment" so as to relieve the stockholder from paying for his stock in the first instance.

SAME—RIGHTS OF STOCKHOLDERS—ACTIONS—EQUITY. Equity will not give relief to a stockholder of a corporation, who, in bad faith made arrangements with a creditor whereby the corporation's property was subjected to execution sale, under an agreement whereby the same was to be redeemed and deeded to the stockholder, who

[1]Reported in 108 Pac. 956.

tried to defeat a redemption by the corporation when he might have paid the judgment or redeemed and held as equitable owner for the company.

SAME—LACHES. An action by one claiming stock in a corporation and for an accounting and equitable relief is barred by laches, where he was not diligent in the prosecution of his remedy for breach of the contract for his stock, but delayed seven years after knowledge of the breach, during which time he jeopardized the property of the corporation and subjected it to forced sale to the end that the title should come under his personal control.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 24, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to establish rights as a stockholder in a corporation, for an accounting and other equitable relief. Reversed.

Alex M. Winston and *B. B. Adams*, for appellants.

Wm. T. Stoll and *C. P. Lund*, for respondent.

CHADWICK, J.—In the spring of 1898, plaintiff became interested in certain mining claims in the Coeur d'Alene country, Idaho. These he held under verbal or written options expiring September 10 of that year. With another he had done some little work on the claims and had made several unsuccessful efforts to interest capital, so that, on or about September 1, he sought defendant Kennedy J. Hanley, who went with him to look over the ground, and who thereupon agreed to furnish the money to take up the options, provided extra time could be arranged and the property on further investigation proved to be an attractive investment. New options were obtained by plaintiff in his own name, not only on the property then held by him, but upon some other ground adjoining. Between that time and March, 1899, Hanley expended considerable money in exploring and developing the property.

In March, 1899, a corporation, the Independence Consolidated Mining Company, Ltd., was organized. A board of

trustees was elected. This board selected defendant Hanley as president and plaintiff as secretary. The price of the stock was fixed at fifteen cents per share, and plaintiff was made selling agent. He also acted as general superintendent of the work at the mines, and received a salary of $150 per month. One hundred and fifty-two thousand shares of stock had been sold or subscribed under contract to pay upon call, up to September 1, 1899. On or about that date a meeting of the trustees was held, at which at least one of the stockholders was present, representing himself and some others who refused to carry out their contracts of purchase for the reason that the company did not have title to the property. Bad feeling had come between plaintiff and Hanley, and in consequence at that meeting the plaintiff resigned as secretary and another was elected. From that time the plaintiff took no active interest in the affairs of the company. Defendant Hanley assumed the active management of the company and, out of his own funds, paid the full amount due upon all the options, excepting the sum of either $500 or $750, and the balance of the purchase price of one claim which he deemed worthless. The whole sums so paid by him aggregated $47,200. In 1901 the company had become indebted to numerous creditors. A suit was brought by the Coeur d'Alene Hardware Company in its own behalf and as assignee of others. This suit was prosecuted to judgment. The several option agreements, together with their accompanying deeds, had been left at the First National Bank of Wallace. Plaintiff was named as grantee in all of these and, they not having been withdrawn and recorded, the company had no record title to its property. These facts being known to the hardware company, at its solicitation and upon the request of the creditors, who gave plaintiff the $500 or $750 necessary to cover the balance due on one of the claims, plaintiff took up the deeds, put them of record and then made a deed to the Independence company. Thereupon an exe-

cution was levied, and the property sold and bid in by the hardware company.

Prior to the transactions just noted, plaintiff had an understanding and agreement with the hardware company that, if the property was not redeemed by the Independence company, it would sell the claims to him for the amount of the judgment, interest, and costs. Plaintiff says that he intended to buy the property for the benefit of the company, but there is no evidence of this when considered in the light of the fact that a redemption would have accomplished the same purpose, leaving him in a position of a preferred equitable lien holder. Defendant Hanley had made unsuccessful attempts to raise the money to accomplish the redemption, and on the last day, he with another, who so far as the record shows was vice president of the company, went to Wallace and sought an extension of twenty-four hours. This was refused by the hardware company. Hanley and Argyle, the vice president, then arranged with Mr. August Paulsen for the money, but the sheriff, acting under the direction of the hardware company, refused to accept his certified check, demanding United States currency, and that alone. The amount necessary for redemption was finally gotten together, and received by the sheriff. Hanley as president, and the vice president acting as secretary, executed a deed to Paulsen under an agreement that, if the amount was repaid with eight per cent interest within six months, he would reconvey the property. Paulsen executed a deed to the company at the time and left it in escrow at the bank. Mr. Paulsen insisted upon this arrangement in order to avoid the complications of a mortgage and possible foreclosure. His attorney advised him that by so doing he took the absolute title subject only to his agreement to resell within a certain time at a certain price. The money was not paid to Paulsen within the time limited, and some time thereafter Hanley paid the full amount due, $13,505.92, being the amount advanced with

interest, and took a deed to the company. This deed was never recorded, and Hanley now claims it to be lost. The deed from the company to Paulsen was recorded June 14, 1904, and came to the actual notice of plaintiff within the ensuing year. Plaintiff claims that he then sought Argyle, who told him the deed was intended as a mortgage and that it was all done for the benefit of the company; that he and Argyle then went to the bank and examined the escrow agreement with Paulsen, but not the accompanying deed, it being sealed. This he says satisfied him. Argyle, who at the time his testimony was taken had no interest in the company, does not remember this circumstance.

In January, 1907, the Independence Lead Mines, Ltd., was organized, at the instance of and under the direction of the attorneys of third persons who had become interested in the property, and title passed to the Lead Mines company by deeds executed by Hanley, the Consolidated company, and Paulsen, Paulsen in the meantime having, at the request of Mr. Hanley, made another deed direct to him. No stock in the Consolidated company had ever been issued, but prior to the organization of the Lead Mines company, Hanley paid to all of the stockholders of the Consolidated company who had paid fifteen cents per share the full amount paid in by them, and became the owner of all the stock, or the right thereto, unless it be held that plaintiff is the owner of the amount claimed by him. The affairs of the Consolidated company were not carried on with any formality after September, 1899. Such books and records as there were were turned over by plaintiff to the new secretary elected at that meeting, and have been lost, as Hanley claims, or at any rate they were not before the court at the trial.

Plaintiff asserts an interest in the Consolidated company to the extent of one hundred thousand shares, or one-tenth of the whole capital stock, under an agreement made by Hanley at the September, 1899, meeting. In the absence of the minute books, he submits the following memorandum, which

he says is the original draft of the proposition made by Hanley and taken down by him as secretary at that time:

"I will protect all present subscribers to the extent of assessing 750,000 shares fully fifteen cents before any further assessments shall be levied against those of such subscribers who shall pay their full subscription to said stock; that is, fifteen cents per share, fully guaranteeing to carry free from all assessment or incumbrance 100,000 shares of said stock of Clarence Cunningham who shall not be assessed for said 100,000 shares until all the aforesaid 750,000 shares shall have paid into the treasury fully fifteen cents per share;"

it being plaintiff's claim that up to that time he and defendant were equal partners and had equal interest in the company; that they had subscribed for 500,000 shares of the stock, each 250,000, and that the balance was to be left in the treasury and sold for the benefit of the company; that the affairs of the company at that time being in bad shape, he proposed an agreement similar to the one he says Hanley made, but that because of Hanley's financial interest in the company the directors accepted the one made by Hanley.

It will be seen that the 750,000 shares, together with the 152,000 already sold, left approximately 100,000 shares unaccounted for. It is this stock that Cunningham claims as his own. On the other hand, Hanley insists that no such agreement was ever made; that the only interest he had in the meeting was to make the subscribers pay up or get out of the company; that plaintiff was never at any time interested other than as his agent; that he was paid a salary for all his services, and, while he was a trustee and officer of the company, it was understood that his interest was only nominal and sufficient to comply with the law in that respect.

Plaintiff does not give a very satisfactory explanation of these preliminary transactions. He says that he signed the subscription book of the company but, in answer to a question: "How much did you subscribe?" he says: "I don't remember." Although Hanley had, prior to the organization

of the company, advanced $5,250 as against his possible $1,000, in answer to the question: "Was it your understanding that he was to have credit for this amount of $5,250?" he says: "No, sir." The trial court found that plaintiff was entitled to one hundred thousand shares of Consolidated stock free of all charge, and appointed a receiver to take over the property. From this decree the defendants, other than Argyle and Newel, who had no interest in the result of the litigation, have appealed.

The testimony is so contradictory and so unsatisfactory, and respondent and appellant Hanley are so antagonistic, and as we believe, equally determined to get the advantage of the other, that we shall be governed as far as possible, as the trial judge evidently was, by the written evidence. The writing upon which respondent bottoms his case was construed as follows:

"At said meeting the defendant Hanley entered into an agreement with the Consolidated company and with the plaintiff by the terms of which he purchased from the company seven hundred and fifty thousand (750,000) shares of its capital stock at fifteen (15) cents per share, to be paid for in installments in such manner as to provide funds necessary to make all the payments due under the terms and conditions of the said options and to continue development work upon said mineral claims until the full amount of said purchase price of seven hundred and fifty thousand (750,000) shares should be paid into the treasury and expended upon said property; and also agreed to carry the plaintiff free from any charge or payment for one hundred thousand (100,000) shares of the capital stock of said company, which he, the plaintiff, then owned, until every other share in said corporation should have paid into the treasury the sum of fifteen (15) cents per share. A part of said agreement was that the plaintiff and defendant Hanley should donate to the treasury of the company sufficient of their individual stock to make up said seven hundred and fifty thousand (750,000) shares, which they accordingly did. Thereupon the defendant, the Consolidated company, by and through its Board of Trustees, caused said agreement to be entered upon

the books of the company, which books were then placed in the custody of the defendant Hanley, and have never since been in the custody or control of any other person or persons."

It will be noticed that the court gave to the words "free of assessment" the meaning "free from any charge or payment." The writing will not bear this construction. At best the words "shall not be assessed for" can only be held to be an agreement that respondent would not be called upon to pay any assessment upon, or any part of, the purchase price until Hanley had paid in full for the 750,000 shares. It so occurred to the court on the trial:

"The Court: My understanding is that he was not to pay anything until all the other stockholders had paid fifteen cents a share; then he would have to pay fifteen cents?"

to which respondent answered:

"No; I would meet the assessments after that as they were levied on the entire stock of the company; for instance, when the other stock had paid fifteen cents into the treasury of the company, then any further money required would be levied equally or assessed equally against all of the stock of the company, mine included."

He also says:

"Q. Was it the understanding that Mr. Hanley was to have any stock over and above this seven hundred and fifty thousand shares he was to buy at fifteen cents? A. No, sir. Q. In other words, there was not anybody to have any stock that they did not buy at fifteen cents; is that right? A. I was to have one hundred thousand shares. Q. Free? A. Under the terms of that agreement. Q. Free, without paying anything for it at any time? A. I considered I had paid something for it at some time. Q. Without paying anything into the company's treasury for it at any time? A. I had already paid in money, yes, sir. Q. And what was Hanley to have for what he had done prior to that time? A. There was no agreement that he was to have anything. Q. Wasn't he to have one hundred thousand shares of stock himself free? A. It was not so stated. Q. Isn't it a fact that he was to have

one hundred thousand shares of stock himself, the same as you? A. It is not."

The contract being denied, respondent does not show any equities that would entitle him as against Hanley to all of the remaining stock for nothing. He had been paid for his services while Hanley had put up every dollar that had gone into the property. It is extremely improbable that Hanley would agree to put up $125,000 as against respondent's nothing, and allow him to take free of all costs $15,000 worth of stock, and this at a time when they were in bad blood. If such was the intent of the parties, it would seem that common prudence would have dictated a more secure contract than that here offered.

Aside from these considerations, we are convinced that respondent should not recover for other reasons. There are none interested or contending for any interest in the Consolidated company other than respondent and Hanley, and admitting that Hanley got possession of the property in violation of his agreement, he did no more than respondent attempted to do. It can hardly be contended that, when he allowed the judgment creditors to pay $500 or $750 as the case may be for his personal account in order to release the deeds, and when he then recorded them, together with a deed from himself to the company, so as to permit an execution to be filed and a sale to occur under an agreement with the execution creditor that it would bid in the property and sell to him after the period of redemption, he acted in good faith. Especially so, when no demand was, or has since been, made on him for the money advanced to take up the deeds, and the creditors, in furtherance of that agreement, refused to extend the time for redemption even twenty-four hours, refused the check of Mr. Paulsen although certified, refused bank notes or anything other than legal tender under the Federal statute. It clearly shows collusion and intent to defeat the company. Good faith and the rights of the company demanded other conduct. Respondent could have, as a

stockholder, paid the judgment or redeemed and held as the equitable owner for the company, or he could have asked the appointment of a receiver and compelled a suit against Hanley to recover the balance due on the contract as he asserts it to be. He took the chance of appropriating the property of the company after the period of redemption had expired, and as against the present owners, should not be heard in a court of equity.

Equity bars recovery for another reason. Respondent has not been diligent in the prosecution of his remedy. His rights did not depend, as the lower court seems to have assumed, upon his finding out that the reconveyance from Paulsen was not for the benefit of the Consolidated company, but upon the contract which we have hereinbefore quoted. The time within which he should have acted began to run from the time notice of the breach of the contract was brought home to him. He knew as early as 1901 that Hanley had not paid for the 750,000 shares. Otherwise no judgment could have been taken against the company. He knew that Hanley, in violation of the agreement, had suffered the property to be jeopardized and subjected to forced sale. Then it was that he should have sought the courts. As we have said, he could, through the medium of a receiver, have compelled Hanley to furnish the money to take up these deeds and thus free the property. He did nothing, but suffered and assisted the further progress of events to the end that the title should come under his personal control. This action was begun in December, 1908. Considering all the circumstances, the character of the property, the lapse of time and conduct of the respondent, the equitable doctrine of laches intervenes. This doctrine is most frequently applied in mining cases, for the reason suggested in *Patterson v. Hewitt*, 195 U. S. 309:

"The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the

question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought with unreasonable delay. . . . It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter—in 1893. Whether the refusal of Hewitt to make the deeds was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Ferguson, that they were put in possession of this valuable property. If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a

mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

See, also, *Johnston v. Standard Min. Co.*, 148 U. S. 360; *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 23 Pac. 908; *Graff v. Portland Town & Mineral Co.*, 12 Colo. App. 106, 54 Pac. 854; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757;

In *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, this court said:

"There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed."

This case falls within these rules, and for the reasons suggested, the judgment is reversed, with instructions to dismiss the bill.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8061. *En Banc.* May 18, 1910.]

H. S. JACKSON, *as Administrator etc., Respondent*, v. DAVID LAMAR *et al., Appellants.*[1]

DEEDS — EXECUTION — VALIDITY — MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show mental incapacity to execute a deed, where it appears that the parties to the deed were brothers, who had lived together as bachelors and accumulated considerable property held by them in common under an agreement that the first to die should execute a deed to the survivor to avoid a testamentary disposition of the property, that the deed was executed the day after the grantor was taken to a hospital suffering from an illness from which he died a month later, that three witnesses present at the time clearly established that he fully understood the nature of the business, and the only evidence to the contrary being that of nonexperts as to the grantor's appearance during his stay at the hospital.

DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY. Possession of a deed by the grantee raises a strong presumption of delivery, which is not overcome by the evidence of an extreme partisan, disappointed in not receiving a portion of the estate granted, who testified, seven years after the occurrence and several years after the death of both parties to the deed, that the grantor, who was on his deathbed at the time and had executed a deed to his brother, pursuant to a previous agreement, directed the notary to take care of the deed until he called for it, which he would do as soon as he got well; the notary having testified that the grantor executed the deed in order, as he stated, that his brother should have the estate in case of his death.

MORRIS, FULLERTON, and PARKER, JJ., dissenting.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered November 27, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover possession of real property and to quiet title. Reversed.

[1]Reported in 108 Pac. 946.

Sharpstein & Sharpstein and *James H. Hull*, for appellants.

Rader & Barker, *Gose & Gose*, and *James W. Boyd*, for respondent.

RUDKIN, C. J.—James C. Lamar and Joseph Lamar, his brother, lived for many years in Walla Walla county, where they accumulated real and personal property of considerable value, which they held in common. The brothers never married, but lived together in bachelor quarters, at a place called Lamar Station. It appears that James C. Lamar, the elder brother, was strongly opposed to making a testamentary disposition of his property, fearing that his will would be contested and overthrown after his death. To avoid such a contingency, the two brothers had an agreement or understanding between themselves that whichever one should die first would convey his interest in the common property to the survivor before the end came. On the 4th day of October, 1901, James C. Lamar was taken to St. Mary's hospital at Walla Walla, suffering from some malady the nature of which is not disclosed by the record.

On the 10th day of October, 1901, he executed a deed of the property now in controversy in favor of his brother Joseph Lamar, pursuant to the agreement above referred to, and thereafter died intestate on the 11th day of November following. On the 24th day of October, 1907, the plaintiff was appointed administrator of his estate, and by this action sought to recover the property described in the above deed, from the grantees of Joseph Lamar. From a judgment in favor of the plaintiff, this appeal is prosecuted.

The rights of creditors are not involved, and if the deed of October 10, 1901, was valid as between the parties, the judgment of the court below is erroneous and must be reversed. The validity of that deed is challenged on two grounds: (1) because of mental incapacity of the grantor at the time of its execution, and (2) for want of a valid delivery. At the

date of the execution of the deed, the grantor was eighty-five years of age, and was suffering from the illness or disease that caused or resulted in his death about a month later. There was considerable testimony tending to show that the grantor was weak, had no expression in his face, did not care to talk, was indifferent and unconcerned, was not competent to attend to ordinary business, and the like, during his stay in the hospital. This testimony all came from nonexpert witnesses, some of whom at least manifested no little bias in favor of the respondent. Their testimony was based on appearances only. They testified to no act or statement of the grantor tending to show that his mind was unbalanced, or that he was bereft of reason. The appearances and conditions described by these witnesses were not at all unusual when we consider that the grantor was an eccentric old man, on his deathbed. On the other hand, the testimony of the two witnesses who were present at the execution of the deed shows clearly and convincingly that the grantor was then in full possession of his faculties, and understood the nature and quality of his act and the business in hand. Their testimony is strongly corroborated by the signature to the deed, and by a witness for the respondent who claims to have appeared on the scene at the moment of the transmission of the deed. The latter witness testified that the grantor gave certain instructions as to the final disposition of the deed, showing clearly that he fully understood the nature of the business under consideration. The respondent relies largely on the testimony of this witness to show a nondelivery of the deed, and if the grantor had sufficient mind and memory to give these instructions, he also had sufficient reason and intelligence to enable him to execute and make an absolute delivery of the deed. On the entire record, we are convinced that the judgment cannot be sustained on the ground of mental incapacity on the part of the grantor at the time of its execution, for there is no substantial testimony in the record tending to establish that fact.

The circumstances attending the execution and delivery of the deed are these: The deed was prepared by, or at the instance of, the grantee, who informed one Max Baumeister of the agreement between himself and his brother, and requested him to go to the hospital and procure the deed. Baumeister repaired to the hospital and had a social talk with the grantor for a few moments, after which he informed the grantor of his mission and of the agreement with his brother relating to the final disposition of their property. The grantor admitted that such was their agreement, and stated that he was ready and willing to execute the deed. The deed was thereupon signed by the grantor before Baumeister and one Blanchard as witnesses, and acknowledged before Baumeister as a notary public. The deed was then handed to Baumeister, who returned to his office and delivered it to the grantee. After the death of the grantor, the deed was returned to Baumeister for the purpose of having it recorded. The mere possession of a deed by the grantee carries with it a strong presumption of delivery which can only be overcome by clear and convincing evidence. *Tunison v. Chamblin*, 88 Ill. 378; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; 1 Devlin, Deeds (2d ed.), § 294.

The evidence relied upon to show a nondelivery is the following: Baumeister testified:

"A. I just went into the room and afterwards I got social with him for perhaps a few minutes, had a social chat with him, and then I questioned him regarding that deed and what Joe had told me, and he admitted that that was the case and that he was ready to sign and willing to sign, and he did sign. Q. And that is all there was to it? A. Yes; of course, he said that Joe and he had had an understanding to that effect, and he wanted Joe to have the interest in it in case he passed on, to keep him from being annoyed by the heirs in the East."

Mrs. DeGruchy, a witness for the respondent, testified:

"A. I left the room, and after awhile my attention was called that Mr. Baumeister was going, and I went to see if

their business was concluded, and I heard Mr. Lamar say, as best he could, he spoke up and said, 'Take care of the deed until I shall ask you for it, which I will as soon as I get well.' And Mr. Baumeister said: 'Very well, James, I will take care of it.' "

Also:

"Q. I will ask you, Mrs. DeGruchy, speaking of the conversation that you had with James C. Lamar, how soon was that after Mr. Baumeister went out of the room? A. One of the sisters came in and gave him a stimulant, and after the medicine had comforted him, then he told me that he had deeded his land to Joseph after his life, but not until I am dead; and I said, 'What then, James?' 'Then,' he said, 'it must go back to Missouri to the poorer portion of my relatives.' "

A special interrogatory was submitted to the jury, embodying the substance of the testimony of the last named witness first above mentioned, but the jury were unable to agree upon an answer. There is nothing whatever in the testimony of the witness Baumeister tending to defeat the operation of the deed. The mere statement of the grantor that he wanted his brother to have his interest in the property in case he passed on, to keep him from being annoyed by the heirs in the East, has no tendency to establish a nondelivery of the deed or to overcome the presumption arising from its possession by the grantee. The conversation referred to the agreement between the brothers and not to the delivery of the deed. If, therefore, the deed was not delivered, the fact of nondelivery must rest on the testimony of Mrs. DeGruchy, and if her testimony is sufficient, if believed, to show a nondelivery, the case must be remanded for a new trial, because the special finding of the jury shows that the general verdict was not based on her testimony or on the statements she attributed to the deceased grantor, and there is no other theory upon which the judgment can be sustained. If, on the other hand, the testimony of this witness was incompetent or is insufficient as a matter of law to show a non-

delivery of the deed, a final judgment should be directed by this court. It may be that the grantor did not intend to divest himself of all his property during his lifetime, or that he expected to recall the deed in the event of his recovery; but are we permitted to speculate as to his probable intentions? Does not the law, on grounds of public policy, attach certain consequences to his overt acts against which his intentions cannot prevail?

In *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 44, approved by this court in *Richmond v. Morford*, *supra*, the court said:

"If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object."

See, also, *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. 461; *Darling v. Butler*, 45 Fed. 332, 10 L. R. A. 469; *Duncan v. Pope*, 47 Ga. 445; *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511. And delivery to an agent designated or appointed by the grantee to receive the deed is a delivery to his principal. *Ordinary v. Thatcher*, and *Hubbard v. Greeley*, *supra*.

Under these authorities it is extremely doubtful whether a grantor may make the grantee the depositary of his deed for any purpose or, if he does, whether the law will not give full effect to the deed contrary to his intentions. But, if we concede that the testimony of this witness was sufficient to defeat the deed, if believed, it is not the clear, convincing proof that the law exacts in such cases. The jury was not

satisfied with the truth of her testimony. The witness was sorely disappointed because she did not receive a portion of the estate herself, and was an extreme, if not a bitter, partisan. She was attempting to give the details of a conversation that occurred more than seven years before, and her testimony was denied by other witnesses. It seems to us that such testimony as this is utterly insufficient to defeat a deed seven years after it has been given over to the grantee, and several years after the death of both parties to the instrument. As said by the court, in *Tunison v. Chamblin, supra*:

"When a deed, duly executed, is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise, titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing he never delivered the deed. The unsupported evidence of a grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is, in many material matters, contradicted, and he seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence, adopting rules for the attainment of justice, can never sanction a rule fraught with such unjust and iniquitous results."

Believing, therefore, that the deed under which the appellants claim is valid in all respects, the judgment of the court below must be reversed, with directions to dismiss the action. It may be that the law does violence to the immediate intentions of the grantor in this case, but his ultimate intentions are given sway. Reversed and remanded.

CROW, DUNBAR, CHADWICK, and MOUNT, JJ., concur.

MORRIS, J. (dissenting)—I dissent. As suggested in the majority opinion, the main questions involved in this appeal are, (1) the sufficiency of the evidence to establish mental

incapacity of the grantor at the time of the execution of the deed, and (2) its delivery. Upon the allegation of mental incapacity, it was not necessary to show an entire loss of mental power. It was, however, in the absence of any undue influence, necessary to show that, at the time of the execution of the deed, October 10, 1901, the mind of James C. Lamar was in such a feeble condition, arising from either mental or physical weakness, that he could not, and did not, understand the nature, character, and consequences of his act. This, however, under the issues, was a question of fact for the jury, and we should not disturb their verdict if there is substantial evidence to support it.

Where there is evidence tending to support a given contention, its weight is for the jury. James C. Lamar entered the hospital October 4; the deed was executed October 10, and he died November 11. During all this time he was a very sick man, and a number of persons who saw him during that time gave their opinion as to his mental capacity, based upon what they then and there observed. This evidence was received without any objection as to its competency or the competency of the witnesses, and the jury had a right to consider it. I refer to some of this evidence:

"He didn't have any expression in his face at all; he was too weak; he didn't care for anything; . . . he was unconcerned; he didn't pay any attention to any one; . . . he just looked as if he was about through with; he didn't care to talk; you could see that he was giving out; he was not capable of attending to any business; . . . he didn't have any use of his body; he was too weak to raise his hands; he was just a weak, worn-out man; . . . he was very weak; he seemed to be prostrated and languid; he seemed to be growing weak, and he didn't seem to be in his right mind, and he didn't seem like himself some way; . . . it seemed that his mind wandered, and he didn't seem his old self at all; it was difficult for him to talk; his speech seemed to be thick; he couldn't get his voice; he didn't seem to have control of his voice; . . . he seemed to have a vacant expression; he didn't seem to be natural; . . . he was growing weaker all the time; he was

swollen all over; his bowels were awfully swollen; he couldn't stand the cover on his bowels; his feet, hands and arms were swollen; his limbs were helpless; . . . he would be lying there apparently unconscious, couldn't lift his hands to his mouth, couldn't handle a spoon, couldn't get anything out of him. It does not seem that he was ever capable of attending to business; his mind was perfectly blank; could not get anything out of him; don't know whether his mind wandered or not; seemed to be blank; he lay with his eyes closed and, when he looked out of them, they were wild."

Other witnesses gave it as their opinion that he was capable of understanding and appreciating what was going on. With such evidence submitted to the jury under proper instructions, I cannot say there was no substantial evidence to justify the verdict. It is true that the evidence, outside of the opinions given, is largely of his physical condition; but there was sufficient to justify the jury in finding that his mind was in such a feeble condition from his bodily infirmities that he had no understanding or appreciation of the character and extent of his act at the time of the signing of the deed.

The second question submitted to the jury was as to the delivery of the deed. To substantiate this contention, respondent relied mainly upon the testimony of Mrs. DeGruchy, who testified that she came to Mr. Lamar's room just as Mr. Baumeister, who had brought the deed to the hospital and taken Mr. Lamar's acknowledgment to it, was leaving, and she heard Mr. Lamar say: "Take care of the deed until I shall ask you for it, which I will as soon as I get well," and Mr. Baumeister said: "Very well, James, I will take care of it." If the jury believed this testimony, it is apparent to my mind there was no delivery of the deed. Mr. Baumeister does not anywhere in his testimony specifically deny this testimony of Mrs. DeGruchy, although he does inferentially by detailing all the conversation he had with Mr. Lamar, which does not include what Mrs. DeGruchy testified to having heard. He says:

"I just went into the room and afterwards I got social with him for perhaps a few minutes—had a social chat with him, and then I questioned him regarding that deed and what Joe had told me, and he admitted that that was the case, and that he was ready to sign and willing to sign, and he did sign. Question: And that is all there was to it? Answer: Yes. Of course, he said that Joe and he had had an understanding to that effect, and he wanted Joe to have the interest in it in case he passed on, to keep him from being annoyed by the heirs in the East."

Mrs. DeGruchy also testified that she was in the room just prior to Mr. Baumeister's coming in; while Mr. Blanchard, a witness to the deed, says he was there before and after its signing, and there was no one else present except Baumeister; that he did not hear what was said, as he was hard of hearing; all that he heard was Mr. Lamar asked him to sign the deed as a witness. Baumeister also says Blanchard was the only other person present at the time. The jury was requested to make a special finding, covering this phase, and instructed to answer "Yes" or "No." The finding submitted to the jury was as follows:

"Question: Did James C. Lamar, at the time he gave the deed in question to Max Baumeister, say to Baumeister, 'Take care of the deed until I shall ask you for it, which I will as soon as I get well;' or words to that effect; and did Max Baumeister there say to James Lamar, 'Very well, I will take care of it and you can have it when you want it,' or words to that effect? Answer: We, the jury, cannot agree to answer the above question by 'Yes' or 'No.' "

It is, therefore, impossible to say what the belief of the jury was as to that conversation; whether they meant by their answer that they were divided, or whether there was some qualification. They did not answer it, and hence it can have no bearing one way or the other. It is difficult to see what effect it could have had upon the general verdict, in case they had answered it. It was by no means a special verdict or finding of any ultimate fact in the case; it was simply

an attempt to discover what the view of the jury was as to this item of evidence, which in my judgment was not proper. Questions submitted to a jury should be restricted to ultimate facts upon which the rights of the parties directly depend, and should not relate to mere evidentiary facts. 20 Ency. Plead. & Prac., 330.

"However natural the curiosity parties may have to know the precise course of reasoning by which jurors arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence and thus practically subject them to a cross-examination as to the entire case." *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 145, 22 N. E. 15.

"It is the controlling fact or facts that should be ascertained by the special finding and not the testimony establishing these facts." *Adams' Adm'r. v. Louisville & N. R. Co.*, 82 Ky. 603.

I cannot, therefore, hold, as contended for by appellants, that the failure of the jury to answer this interrogatory in the affirmative should be taken as a finding on their part that James C. Lamar and Max Baumeister did not have the conversation attributed to them by Mrs. DeGruchy; nor, as contended by the majority, that the verdict was not based upon her testimony. The general verdict is susceptible of a finding that it did occur, and showed a plain purpose and intent on the part of James C. Lamar that the deed was not then to be delivered to Joseph Lamar, but was to be kept subject to his control.

It needs no citation of authority to establish the law to be that there is no delivery of a deed until the grantor has so dealt with it as to lose control and dominion over it. There can be no delivery until there is a surrender of possession by the grantor, either absolute or conditional; absolutely, if the effect of the deed is to be immediate and the title to pass; conditionally, if the operation of the deed is to be postponed or made dependent on the happening of some subsequent

event, in which case the delivery can be made by placing the deed in the hands of some third person to be retained by him until the happening of the event. But even in such a case, it is an essential characteristic and indispensable feature that there must be a parting with the possession and with all control and dominion over it. *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. 240; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 21 Am. St. 131, 13 L. R. A. 64; *Hoffmire v. Martin*, 29 Ore. 240, 45 Pac. 754; *Fisher v. Hall*, 41 N. Y. 416; *Cook v. Brown*, 34 N. H. 460; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421. In this connection I quote the testimony of Baumeister above set out, to the effect that James C. Lamar, at the time of the signing of the deed, said "he wanted Joe to have an interest in it *in case he passed on*, to keep him from being annoyed by the heirs in the East."

This evidence, coupled with the fact that five days after the death of James C. Lamar this deed was filed for record at the request of Baumeister, was a circumstance from which the jury were justified in believing that James C. Lamar never intended to surrender the control of that deed, nor to part with the title to his property until his death; and that his very purpose in making the deed was to have it take the place of a will. This view is strengthened by the testimony of Harvey Shaw, a witness for appellant, who testified that he had a conversation with James C. Lamar, in which he told him "he had better make up his mind about his property, and he (Lamar) said that this man Senator Tilden made a will, and they broke it, and it is of no use for a Missourian like me to make a will. As far as the property was concerned he said that, if he died first, he wanted Joe to have it, and that Joe could settle with them Missourians."

John Hoffman, another witness for appellants, testified to talking with James C. Lamar about making a will, in which conversation Lamar said: "That is no way to do; that is not the way I am going to do; I am going to give a

deed to the man that I want to give it to my brother or my brother will give it to me. That is the way to do; it is more substantial, for the lawyers get so smart; if you make a will, they always find a loophole in it, and they will throw it out of courts, and your will will not go through." This evidence was offered by appellants to show it was the intention of James C. Lamar to give his property to his brother Joe; but it was also evidence to show, and under the instructions of the court the jury were justified in believing it showed, an intention on the part of James C. Lamar not to part with the possession and title to his property until his death, and then have his deed take the place of a will. In other words, it was his intention, at the time he signed the deed, to make a disposition of his property of a testamentary character, which would take effect, not in his lifetime, but at his death. Such being the case, there was no delivery, and the deed could not operate as a will unless it was executed with all the statutory formalities pertaining to wills. *Cline v. Jones*, 111 Ill. 563; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049; *Patterson v. Snell*, 67 Me. 559.

The judgment should be affirmed.

Fullerton and Parker, JJ., concur with Morris, J.

[No. 8581. Department Two. May 19, 1910.]

PHOENIX PACKING COMPANY, *Appellant*, v. HUMPHREY-BALL COMPANY, *Respondent*.[1]

SALES—ACTION FOR PRICE—PERFORMANCE BY VENDOR—NECESSITY—STATUTES—CONSTRUCTION. Civil Code of California, § 1440, providing that, if a party to a contract gives notice that he will not perform the same, the other party is entitled to enforce the same without previously performing any of the conditions on his part, has no application where the vendee gave notice of cancellation of a sale, and the vendor refused to accept the cancellation and gave notice that the goods would be shipped as per contract, after which no further communications passed between the parties.

SALES—WHAT LAW GOVERNS—PLACE OF DELIVERY—CONSTRUCTION. Where plaintiffs, doing business at San Francisco, offered, through their broker at Spokane, to sell a car of raisins to the defendants, doing business at Spokane, f. o. b. California, with right to inspect the goods on arrival, terms cash with documents attached, and the offer was accepted through the broker at Spokane, where the accepted contract was afterwards delivered by the broker, the contract is governed by the laws of Washington where delivery of the goods was to be made; especially in view of testimony explaining the expression "terms—cash with documents attached" to mean that the goods were to be shipped with shipping receipt attached to the draft, and not to be delivered and released by the railroad company until paid for.

SAME—"F. O. B." The terms "f. o. b. California" simply means that the purchaser was to pay the freight from California to the place of destination.

EVIDENCE—PAROL—TO EXPLAIN WRITING. Parol evidence is admissible to explain the expression "terms—cash with documents attached," used in a contract for the sale of goods to be shipped by the seller.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 5, 1909, in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 108 Pac. 952.

E. C. Macdonald, for appellant.

R. E. Porterfield, for respondent.

DUNBAR, J.—On the 15th day of June, 1907, the respondent ordered at Spokane, Washington, through the appellant's broker, to be shipped at a certain time, various amounts and kinds of raisins, at stipulated prices amounting in the total to $2,152.50. This order was afterwards accepted by the appellant at its office in San Francisco. The essential part of the contract is as follows:

"Spokane, June 15, 1907.

"We have this day bought from Phoenix Packing Co., of San Francisco, California, through their broker, M. Johnson-Lieber Co., of Spokane, Washington, to be shipped first half of November, or as soon thereafter as goods can be packed, the following . . . These prices are f. o. b. California, Fresno, less 1½ per cent cash discount. Terms—Cash with documents attached. When buyer requests the privilege of examination before payment of draft, routing to rest with seller. Such examination to be made within three days of the arrival of the goods, otherwise buyer waives all rights of rejection or claim as to quality."

There are other provisions in the contract, but their consideration is not necessary to a determination of this case. The contract was accepted by the appellant and returned to appellant's agents in Spokane, who, in course of time, delivered it to the respondent. On the 10th day of September, 1907, the respondent wrote the appellant, ordering a cancellation of said contract, and stating that it would not accept the shipment. The appellant wrote back to the respondent that it would not agree to the cancellation of the contract, but that it would make the shipment according to the original contract. Nothing further was done in the premises until the commencement of this action for the sum of $350.14, which sum it is alleged is the difference between the contract price and the market value of said goods at the time they were to have been shipped under the contract at the place of delivery—Fresno, California.

The respondent admitted the execution of the contract and the attempted cancellation of the same, but denied that appellant had been damaged in any sum. The respondent also interposed a separate and affirmative defense, to the effect that the respondent had sought to countermand and cancel said contract, and that appellant, on or about the 16th day of September, 1907, notified respondent that it refused to accept any cancellation; that it would ship such goods at the specified time and expected the respondent would accept delivery of the same; that the respondent relied on that notification of the appellant and made no further effort to cancel said contract or countermand said order, and that said appellant failed, neglected, and refused to ship said goods and carry out its contract, against defendant's will. This affirmative answer was denied by the appellant. The appellant pleaded and proved certain sections of the Civil Code of the state of California, among others § 1440, which is as follows:

"If a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part, and does not retract such notice before the time at which performance on his part is due, such other party is entitled to enforce the obligation without previously performing any conditions on his part in favor of the former party."

But this is not the kind of a case, it seems to us, where the section quoted is applicable; for here, notwithstanding the notification on the part of the respondent that it desired to cancel the order, the application for cancellation was positively refused by the appellant, and it notified the respondent to that effect. The last letter written by the appellant to the respondent contains this statement:

"We note that you state that you will positively not accept our shipment of raisins under any consideration, and that your letter is to serve notice of cancellation of contract. Now, gentlemen, you know that it took two to make the contract and we believe that it takes two to cancel it. We shall

make shipment of this car of raisins on contract time and most certainly shall expect you to take delivery of the same."

And in its letter to its own agent, on the same day, occurs the following:

"We have had a letter from Humphrey-Ball in which they inform us that they will not under any consideration accept delivery of the car of raisins. In other words, that they intend to repudiate their contract. We wrote them this morning, and beg to enclose copy of the letter. We wish to state now that we shall insist that they take delivery of this car. We did not care to write them too strong a letter at this time, but for your information we wish to state that we intend to see that they take this car or pay for it, no matter how long it takes us or how much it costs. We are not in the habit of having a firm give us an order, sign a contract, and because the price goes down a little, say that they do not wish the goods."

No further communication was had between the parties until the commencement of this action. There was proof of the value of the goods in California at the time they would have been shipped under the contract, but there was no proof offered as to the value of the goods in the state of Washington.

The principal contention of the appellant is that the court erred in not holding that the contract sued on was made in California and should be construed by the laws of that state; and in holding that the law of Washington alone should be considered in measuring the damages, if any, sustained by appellant. It is also alleged that the court erred in permitting the introduction of evidence as to the custom of merchants in shipping goods, and evidence as to the construction of the contract. It is the contention of the appellant that the law of California governs, and that the market value of the goods in California determines the measure of damages to be allowed. In this we think the appellant is mistaken. Of course, as a general proposition, the rights of parties are determined by the law of the place where the contracts are entered into, in the absence of an agreement to the contrary.

So that it becomes a pertinent question, where this contract was entered into, or where the minds of the parties met in relation to the subject and terms of the contract. The same was either made at Spokane when it was signed by respondent, or it was made at Spokane when it was sent back and delivered to the respondent by appellant's agent. It had been in the possession of the appellant from the time of signing by respondent, until delivered to it by appellant through its agent, after its acceptance by the appellant; and if it be conceded that the minds of the parties did not meet at the time of the signing at Spokane, by reason of the lack of authority on the part of the agent to bind the appellant, the time when their minds did meet was when the accepted contract was delivered to respondent at Spokane by appellant's agent.

Appellant cites many authorities in support of the doctrine that, if a person in one state mails an order for goods to a person in another state, and the person in the other state accepts the same and mails his acceptance to the person sending the proposition, the contract is to be governed by the law of the state where it is so accepted. But these cases do not apply to the case under consideration, for the offer in the first instance was made in Spokane by the agents of the appellant. The acceptance of that offer was also made here, notwithstanding the appellant was doing business in California, for the acceptance was made not through the mail in answer to an offer made, but through the agent of the appellant, resident at Spokane. The contract was delivered at Spokane. The case cited from this court—*Izett v. Stetson & Post Mill Co.*, 22 Wash. 300, 60 Pac. 1128, is not controlling. That was a case where sawlogs had been delivered to the purchaser under a contract of sale providing for payment when they should be scaled, and it was held that the title to the logs passed to the purchaser, and he became liable for the value of the logs in case they should be lost through his

negligence prior to their being scaled. That case involved the proposition so frequently discussed that, where it appears that there has been a complete delivery of the property in accordance with the terms of the sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. And that was the basis of the decision in that case, following the doctrine announced in *Hatch v. Standard Oil Co.*, 100 U. S. 124.

But, outside of any extraneous testimony, the contract itself shows that the title of the goods had not passed to the respondent, and would not have passed to it if they had been shipped at Fresno, California; because, under the contract, the buyer had the right to examine the goods before he was compelled to accept them, and was given three days to exercise such right. All that was meant by the expression "these prices are f. o. b California," was that the purchaser was to pay the freight from California to the place of destination. The rule applicable to the circumstances of this case is announced on page 1339, subd. 2, of 22 Am. & Eng. Ency. Law (2d ed.), as follows:

"The place of sale of goods is the place of delivery, where the sale is completed by delivery. Thus, if a person residing in one state orders goods of one residing in another state, who there delivers the goods ordered to a carrier for the purchaser, the contract is deemed to be made there, in the absence of an agreement to the contrary. But if the parties agreed that the goods should be delivered by the carrier as the seller's agent in the state of the purchaser, the law of the latter state will govern."

Under the undisputed testimony in this case and under the terms of the contract, the goods were to be considered the goods of the seller until they were purchased and paid for in Spokane by the respondent. The expression in the contract "terms—cash with documents attached" was explained by the testimony, and such explanation becomes important in the

determination of this cause. Mr. Amos, who was the agent for the appellant and the man who sold the goods to the respondent, in answer to the question, "I will ask you what that sentence means; what is the technical meaning of that phrase?" (the question referring to the phrase "terms—cash with documents attached,") said:

"It means that the goods are shipped, the shipping receipt and invoice to be attached to the draft. And afterwards it passes through the bank for collection; the goods thereafter to be paid for before the draft will be delivered by the bank; and the bill of lading would have to be delivered to the railroad before they would deliver the goods. Q. In other words, the goods would not be delivered until they were paid for? A. They would not be released by the railroad until paid for. Q. They would not be delivered to the Humphrey-Ball Company until paid for? Is that the fact? A. Yes, sir."

The witness further testified that the bill of lading was attached to the draft sent to the bank, and was not delivered until the draft was paid; that the Humphrey-Ball Company could not get the goods until they were paid for, and that the goods were to be shipped under this contract to the Phoenix Packing Company instead of to the respondent. The witness D. J. O'Callahan testified to exactly the same interpretation of the contract, and stated that the purchaser could not touch the goods; they remained the property of the seller until paid for. To the same effect was the testimony of F. M. Ball. So that it seems plain that this case falls squarely within the rule just cited from 22 Am. & Eng. Ency. Law, that the contract should be construed with reference to the laws of the state of Washington; and there being no proof of any damages under the laws of the state of Washington, the court was justified in arriving at the conclusion at which it did.

It is contended by the appellant that the court erred in admitting the testimony as to the construction of this phrase in the contract. But this was an expression which is plainly open to explanation. The explanation offered had no ten-

dency to dispute the terms of the contract, but simply to determine its meaning. It was therefore admissible.

The judgment of the court will be affirmed.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

[No. 8659. Department One. May 20, 1910.]

E. M. MOSES, *Appellant*, v. P. SUMMERSETT, *Treasurer of Lewis County, et al., Respondents.*[1]

AGRICULTURE—FAIRS—PUBLIC AID—COUNTIES — APPROPRIATIONS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 3024 *et seq.*, which provides that any fair association which has a corporate existence for the purpose of holding fairs may apply to the county commissioners for aid, that the commissioners shall be *ex officio* members of the county fair association, and that all buildings and structures shall belong to the county making the appropriation, and that vouchers for all expenditures of money appropriated shall be made to the county commissioners, a county has no power to appropriate money in aid of the Southwest Washington Fair Association, a state institution (created by virtue of Rem. & Bal. Code, § 3012 *et seq.*) managed by commissioners appointed by the governor and empowered to acquire land for holding fairs under a state appropriation therefor; since the act authorizing county aid to fairs is to be strictly construed, and requires the management and title to be vested in the county, without any indication of legislative intent to authorize county appropriations in aid of a state institution; especially as the act in which such authority is sought antedates the act creating the state institution.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 28, 1909, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the payment of warrants drawn on the current expense fund of a county for the use and benefit of a state fair association. Reversed.

[1]Reported in 108 Pac. 943.

Forney & Ponder, G. E. Hamaker, and *Reynolds & Stewart,* for appellant.

C. D. Cunningham and *J. R. Buxton,* for respondents.

CHADWICK, J.—Chapter 237, Laws 1909, page 857 (Rem. & Bal. Code, § 3012 *et seq.*), after reciting that, "the public welfare requires that there be and hereby is established a state institution, to be known as the Southwest Washington Fair Association," declares the objects and purposes of such association, provides for the inclusion of certain counties to be known as a fair district, provides for its management by certain commissioners to be appointed by the governor, fixes their terms of office, their duties and responsibilities, defines their powers, fixes a location at which the fair is to be held, provides for the acquisition of land, and makes an appropriation to carry out the provisions of the law. As provided by the terms of the law, the state, or possibly the counties comprising the district, acquired title to certain lands located between the cities of Chehalis and Centralia in Lewis county.

On June 22, 1909, the board of county commissioners of Lewis county passed a resolution appropriating out of the current expense fund of the county the sum of $5,000 in aid of, and for the use of, the fair association. Warrants in denominations of $500 each, payable to the order of the treasurer of the fair association, were drawn by the county auditor. These have been presented to, and registered by, the treasurer of the county, and will be paid in the regular order unless that officer is restrained. Plaintiff brought this action setting up the facts as briefly stated by us. A demurrer was filed by the defendants and sustained by the court, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action. Plaintiff has appealed.

As we read the record, the only question calling for our opinion is, whether the appropriation can be sustained by

reference to chapter 174, Laws 1903, page 363 (Rem. & Bal. Code, § 3024 *et seq.*), entitled: "An act to encourage county agricultural associations and fairs, and to provide funds therefor," section 1 of which reads as follows:

"Any agricultural fair association which has a corporate existence for the purpose and object of holding a fair and agricultural exhibition of stock, cereals and agricultural produce of all kinds, including dairy produce as well as arts and manufactures in any county, may apply to the board of county commissioners of such county for grant to pay expenses and premiums awarded."

It is also provided that the board of county commissioners shall be *ex officio* members of the county fair association, in all counties where appropriations are made under the provisions of the act. This act was amended by the last legislature, chapter 62, Laws 1909, page 113 (Rem. & Bal. Code, § 3025 *et seq.*). As amended, the act provides that any and all buildings and structures erected with the funds so appropriated shall become the property of the county making such appropriation, and that full and complete vouchers, covering all expenditures of public money appropriated by the county, shall be made to the board of county commissioners before the close of each calendar year.

Although it is contended that the Southwest Washington Fair Association has a corporate existence within the meaning of the law of 1903, a contention which may well be questioned, we think the judgment of the lower court must nevertheless be reversed. It is admitted that the right to use or appropriate public moneys must be given by statute, but it is insisted that we should follow the intent rather than a literal interpretation of the law. If such be the rule, there is absolutely nothing in the law of 1903, or the amendments thereto, to indicate that the legislature intended to give the county commissioners the right to appropriate county funds in aid of a state institution. It is only in cases where the statute is ambiguous or doubtful and requires construction

that courts are warranted in leaving the plain mandate of the law and speculating upon the intent of the legislative body.

"When the means for the exercise of a granted power are given, no other or different means can be implied because more effectual or convenient." *Bloomer v. Todd*, 3 Wash. Ter. 599, 19 Pac. 185, 1 L. R. A. 111.

Aside from this, the law of 1903 and the amendment of 1909 antedated the law creating the Southwest Washington Fair Association, so that to impute an intent to permit an appropriation of county funds to this fair association, we would have to presume that it had in mind a general application of the statute, when upon its face it is special in the sense that it applies to a certain defined object. If the commissioners can appropriate the funds of the county at all, it must be, as contended, under the act of 1903. This being so, the appropriation must also be subject to expenditure under the terms of that act. The law does not work piecemeal. Under respondents' theory the Southwest Washington Fair Association could expend the moneys without regard to the objects of the grant; whereas, the law is that the county commissioners shall be *ex officio* trustees of the association receiving the grant, implying, if not expressly providing, that the funds should be expended under their direction. In any event, the right of auditing all accounts and expenditures is reserved to them. Nor does the law of 1903 intend a free gift, as this appropriation must be if sustained; but provides in terms that all buildings and structures erected with the funds appropriated shall be the property of the county. But for these conditions, the validity of the act might well be doubted. Laws granting aid to agricultural societies have been generally upheld, but have always been strictly construed. *Harding v. Balder*, 75 Mich. 316, 42 N. W. 942; *Agricultural Society v. M'Intyre*, 17 Johns. 87; *Warren County Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Hogelskamp v. Weeks*, 37 Mich. 422; *Hall v. Kellogg*, 16

Mich. 135; *Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. 160, 367.

Finding no warrant in the statute for extending the terms of the 1903 statute to cover this appropriation, the judgment of the lower court is reversed. This cause will be remanded with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8669. Department One. May 20, 1910.]

R. A. BUELL, *Respondent*, v. ABERDEEN STATE BANK, *Appellant*.[1]

BANKS AND BANKING—RECOVERY OF DEPOSIT—EVIDENCE—FORGERY—OTHER SIMILAR ACTS. Upon an issue as to the forgery of a check paid by a bank, in an action by the customer to recover the deposit, it is error to permit a third person to testify that the bank had refused payment of another check purporting to be drawn by plaintiff in favor of the same payee which was also repudiated as a forgery.

SAME. Upon such an issue, it is error to receive evidence that plaintiff had caused a warrant to issue for the arrest of the payee on the charge of forgery; also, to show that the defendant's officers refused to contribute to a sum to be offered as a reward for his arrest.

SAME. Upon such an issue, it is error to admit evidence that the payee of the check had years before gone under an alias in Alaska, and could closely imitate the signature of the witness.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 4, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon contract. Reversed.

Boner & Boner, for appellant.

E. J. Adams and *A. Emerson Cross*, for respondent.

[1]Reported in 108 Pac. 951.

Morris, J.—Respondent brought the action to recover the sum of $310, claimed by him as a deposit to his credit in the appellant bank, and which the bank refused to pay, denying that respondent was entitled to credit in such sum. Upon the trial, the determination of this issue depended upon whether a check for $310, dated March 10, 1909, purporting to be drawn by respondent to the order of N. L. Marois, and paid by the bank on presentation by Marois, was genuine or a forgery. It was respondent's contention that this check was not a genuine instrument, but had been forged by Marois, and upon this theory the jury returned a verdict in his favor, and the case is brought here upon numerous assignments of error. We will only refer to those we deem material and to be well taken.

F. P. Porter, a witness for respondent, was permitted, over objection, to testify that, on the 9th of March or a day or two thereafter, Marois presented a check to witness at his store; that the same was cashed and was deposited in the bank of Hayes & Hayes, and that payment of such check was refused; that some months thereafter witness had a conversation with Mr. Bradley, an officer of appellant, in which he says he understood the reason for the nonpayment of his check was that the $310 check was in dispute as a forgery. The Porter check was, like the one in question, purporting to be drawn by respondent to the order of Marois, and was also repudiated as a forgery. We think such evidence was incompetent, and its admission was error. The issue was the genuineness of the $310 check, and evidence that led the jury to believe that Marois had forged the Porter check was prejudicial, as by its admission the jury might argue that Marois, having forged the Porter check which was not an issue to be determined by them, had likewise forged the $310 check, and thus reached a determination upon an issuable matter based upon conclusions derived in a nonissuable matter. *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

Respondent was also permitted to testify that he caused a warrant to issue for Marois, in which he was charged with forgery. This was error, as it could prove nothing other than respondent's belief that Marois had committed the crime of forgery, and his desire to apprehend and punish him. If this check was forged by Marois, such fact must be established by competent proof, and respondent's belief in Marois' guilt was not proof of such a character. Mr. Bradley, one of appellant's officers, was interrogated, over objection, as to whether he had not refused to contribute to a sum to be offered as a reward for the arrest of Marois. This, we think, was incompetent. If the bank had made such a contribution, the fact might have been admissible as an admission or declaration on its part that the check was a forgery, but an attempt to show that respondent desired the bank to offer a reward and its refusal was not permissible for any purpose.

Another witness for respondent testified, over objection, that Marois was skillful in the imitation of signatures; that years before in Alaska, he went under an alias, and that he could imitate the witness' signature so closely that witness could not detect the real from the assumed. This, we believe, was error. The effect of such evidence would hedge in appellant with inferential and prejudicial circumstances, and would only seek to establish Marois' ability to successfully forge respondent's signature, were he disposed to do so. *Dow's Executor v. Spenny's Executor*, 29 Mo. 386.

Other testimony is complained of, to the effect that Marois, prior to the alleged forgery, spent money freely; that he spent his time in a manner objectionable to respondent, and when he left was indebted to respondent. We do not pass upon these alleged errors, as the record is not such as to entitle them to review.

The judgment is reversed, and cause remanded for a new trial.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8692. Department One. May 20, 1910.]

OLYMPIA LIGHT AND POWER COMPANY, *Appellant*, v. HENRY HARRIS *etc.*, *et al.*, *Respondents*.[1]

EMINENT DOMAIN—RIGHTS TO BE ACQUIRED—STIPULATIONS—DAMAGES—RESTRICTIONS. In eminent domain proceedings by a power company seeking to create a storage basin by raising the waters of a lake and flooding lands, the relator may at the trial restrict its use so as to permit the landowner to exercise riparian rights for which he seeks damages, provided that they be exercised without damage to relator's dikes and dams; since the limitations and restrictions may be embodied in the decree and given weight by the jury determining the damages.

EMINENT DOMAIN—TRIAL—CONSOLIDATED ACTIONS—SEPARATE VERDICTS. On the trial of actions for the condemnation of separate tracts of land held by different owners consolidated for convenience, in which separate verdicts for the damages were to be rendered, it is error to treat the tracts involved as one tract in the instructions to the jury; and the value of the land taken in each action, and the damage to lands not taken, must be separately determined.

SAME—DAMAGES—MEASURE OF DAMAGES. In eminent domain proceedings to appropriate lands to be flooded, the measure of damages is the fair market value of the lands taken irrespective of any benefit, and the damage, if any, to the lands not taken.

SAME—DAMAGE—EVIDENCE—ADMISSIBILITY. In eminent domain proceedings to appropriate lands for a storage basin, nonexpert evidence that a ridge one thousand feet wide, proposed to be used as one of the retaining walls, would be insufficient for that purpose and would permit leakage, is inadmissible as conjectural; for if ineffectual, damages could be ascertained and recovered.

Appeal by plaintiff from judgments of the superior court for Thurston county, Chapman, J., entered December 20, 1909, adjudging a public use, and awarding damages to defendants, in condemnation proceedings. Reversed.

T. N. Allen, *A. J. Falknor*, and *Troy & Sturdevant*, for appellant.

James M. Ashton and *Thomas M. Vance*, for respondents.

[1]Reported in 108 Pac. 940.

MORRIS, J.—The appellant brought two actions to condemn certain lands in Thurston county bordering on Lake Lawrence. In the one, Henry Harris and others were made defendants; in the other, Henry Harris was the sole defendant. For the convenience of trial the actions were tried together before the same jury, but two separate verdicts were submitted and returned. Upon entry of judgment appeal was taken, and the two appeals are here consolidated and heard together, the same questions being involved in each. The purpose of the actions was the appropriation of lands bordering upon the lake which appellant desired to flood, in its scheme to use the lake as a storage basin for the waters of the Des Chutes river, taking the surplus water from the river in the wet season, and by means of an aqueduct or ditch, conveying it to the lake, and there holding it until the dry season, when it would be returned to the river for use in appellant's power plant further down the stream. In order to use the lake as such storage basin, it will be necessary to construct certain dams and dikes, as the waters of the lake when so used will at times be raised to a height of thirty feet above the present level. Between the lake and the river is a natural divide or ridge of land, which it is purposed to use as a wall or dam to confine the water in the lake when the same is raised to the thirty-foot line, the water when so raised being on an average two hundred feet from the summit of the ridge.

During the trial, some question arose as to the damage to be sustained by respondents because of what was contended to be the loss of their riparian rights in the lake; the right to fish, hunt, water their stock, boating and other domestic uses; whereupon appellant offered the following:

"The plaintiff and petitioner herein hereby offers that the claimants or their grantees or successors in interest to the lands a part of which is appropriated in these proceedings, shall at all times and at any place have access to the lake as it is raised or lowered over the lands appropriated herein, for the purposes of watering their stock, using boats, fishing,

hunting, and all other domestic purposes; provided, however, that those rights shall be exercised without damage to the dikes constructed by the petitioner. These rights to be exercised without cost of compensation and to be embodied in the decree herein.

"L. B. FAULKNER, Manager of the Petitioner,
"TROY & FALKNOR, Attorneys for Petitioner."

This offer, being objected to by respondents, was denied and refused by the court, and petitioner excepting, raises thereon its first assignment of error. Further on a second offer was made as to the character of the dikes with reference to their safety and security, which offer was also refused by the court upon respondents' objection.

We think each of these rulings erroneous. Appellant could undoubtedly have the damage estimated with reference to any particular method it sought to adopt in the taking and use of respondents' lands. And if in any sense the use sought to be appropriated was a restricted or limited use, and one which would still reserve to the landowner any use to which such lands were put or adapted, then such restriction or limitation should have been made a part of the record and embodied in the decree; and if appellant held itself to any specified or particular method of constructing the dikes, such method should also be embodied in the decree, and such limitations given their due weight by the jury in determining the damages to be awarded. *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Ter. 38, 13 Pac. 186; *Seattle & Montana R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Lieberman v. Chicago etc. Rapid Transit R. Co.*, 141 Ill. 140, 30 N. E. 544.

The court below, for the purpose of ascertaining the damages, if any, to the part of the land not taken, treated the lands involved in the two actions as one tract, and in effect so instructed the jury. This was error. The actions were separate and the ownership of the lands involved was

separate and distinct. The actions were tried as one for the convenience of all parties, as the same facts were involved in each action except as to their application to distinct lands; separate verdicts were to be rendered, and it became the duty of the court to keep the questions to be submitted to the jury as separate as the nature of the case would permit. In each action the value of the lands taken in that action and the damage, if any, to the remainder should have been ascertained.

The same error was permitted to creep into the evidence in ascertaining the value of the lands taken. The inquiry in each case should have been the value of the land taken in that proceeding, and the damage, if any, to the remainder, and in ascertaining that fact it would only be proper to ascertain the fair market value of the land taken irrespective of any benefit, and the condition and effect of the taking, and the purpose of the taking upon the lands remaining, to enable the jury to ascertain if such remaining lands were damaged and, if so, to fix the amount of such damage to be determined by them in considering any item or element of damage that might be suggested in the testimony.

Another error complained of was in permitting nonexpert witnesses to give their opinion as to whether the ridge would successfully retain the waters of the lake when raised to the thirty-foot contour line. This was improper. The base of this ridge is given as about one thousand feet wide, and the petitioner, in purposing to use it as a retaining wall or dam for the waters of the lake, when raised, does so upon the theory that it will be sufficient for that purpose and permit of no leakage or seepage. As to whether it will or not is now conjectural, and must be until it is put to the desired use. If it then should be ascertained that it is ineffectual, respondents have their remedy in an action where the damage can be readily and easily determined from the physical facts then existing, and not as a matter of speculation and conjecture as it must now be.

The judgments are reversed, and the cause remanded for a new trial.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8611. Department One. May 21, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES F. NEWCOMB, *Appellant*.[1]

CRIMINAL LAW—APPEAL—RECORD—REVIEW—BILL OF EXCEPTIONS. While a statement of facts or bill of exceptions furnishes the only method of preserving exceptions for review, upon appeal from a conviction of murder in the first degree, the state's motion to strike such matter in the transcript as could only be brought up by bill or statement may be denied by the supreme court, and such exceptions reviewed as are sufficiently shown by the transcript and other matter not within the record.

COURTS—JURISDICTION—DEPARTMENTS. There being but one superior court in a county, it is not error to refuse to transfer a cause for trial from one department to another in which preliminary orders had been made, as the court has jurisdiction.

JURORS—SELECTION—JURY OF COUNTY—DISTRICTS. Const., art. 1, § 22, guaranteeing to accused the right to a trial before "a jury of the county," is not violated by Rem. & Bal. Code, § 94, which provides that the county shall be divided into jury districts, and that an equal number of the jurors shall be drawn from each district for service in any month.

CONSTITUTIONAL LAW—EX POST FACTO LAW—JURORS—SELECTION. An act changing the method of selecting jurors in criminal cases is not an ex post facto law, as it affects only the remedy or method of procedure.

CONSTITUTIONAL LAW—RIGHTS OF ACCUSED—CRIMINAL LAW—NOTICE OF NATURE OF OFFENSE—WAIVER. Const., art. 1, § 22, providing that the accused shall have a right to demand a copy of the charge against him, and Rem. & Bal. Code, § 2091, providing that such copy shall be served, merely grant a privilege that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional.

[1]Reported in 109 Pac. 355.

JURORS—QUALIFICATIONS—NAME. A juror, described in the jury list and summoned as, and answering to the name of, Hall Horton, who was examined and accepted by both sides as satisfactory without either side asking his name, was qualified and competent, notwithstanding his name may have been Horton Hall.

WITNESSES—IMPEACHMENT—EXPERTS—REPUTATION. It is not error to permit a medical expert to be impeached upon his general reputation for truth and veracity, the same as in the case of any other witness.

CRIMINAL LAW—TRIAL—SEPARATION OF JURORS. It is not error to allow jurors in a criminal case to separate during a recess after being selected, before they are sworn to try the case, as the statute applies only to juries selected and sworn.

CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. The savings clause in the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing in this act shall apply to an offense committed before the day when this act shall take effect and that such offense shall be punished under existing laws as if this act had not been passed, is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect.

SAME. Rem. & Bal. Code, § 2006, passed at the extraordinary session of 1901, was a general savings clause applicable to the repeal or amendment of all criminal statutes unless a contrary intention is expressly declared therein, and is sufficient to continue in force the laws repealed by the penal code of 1909 during the interim between the passage and the taking effect of such penal code.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS—APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY. In a prosecution for murder, an instruction that there is no evidence to justify a verdict of manslaughter is not improper comment on the facts, if such is the case; and error cannot be predicated thereon where the evidence is not brought up by bill of exceptions or statement of facts.

APPEAL—RECORD—INSTRUCTIONS. Error cannot be predicated on the refusal to give requested instructions when the instructions given are not brought up in the record.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 5, 1909, upon a trial and conviction of murder in the first degree. Affirmed.

Murray & Lefebvre and *A. A. Howell* (*Louis I. Lefebvre*, of counsel), for appellant.

J. L. McMurray and *A. O. Burmeister*, for respondent.

Morris, J.—Appellant was, on October 20, 1909, convicted of murder in the first degree, and upon entry of judgment upon such conviction, appeals to this court. Many of the assignments of error are not properly before us, inasmuch as there is no statement of facts nor bill of exceptions, which, under our practice, furnishes the only method for preserving exceptions for review in this court, when the same are properly certified to by the trial judge. For this reason the state moves to strike much of the transcript brought here by appellant. This applies, of course, only to such portions of the transcript as contain matter not part of the record in the court below, and to preserve which there must be either statement of facts or bill of exceptions properly certified by the trial judge. This motion is well taken, but from the nature of the case we will not grant it, but will review all exceptions where the transcript contains sufficient of the record, and other matter not within the record, to enable us to pass upon the questions involved.

The first error assigned is the refusal of the court to transfer the cause for trial to Department No. 1 of the superior court for Pierce county. This assignment was before us in the petition of appellant for a writ of habeas corpus, and was then held untenable. *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042. The question then suggested was that the court was without jurisdiction. For the same reasons then advanced, we hold such refusal was not error.

Next, it is said the court erred in overruling appellant's challenge to the panel of jurors. The crime of which the appellant was convicted was committed in May, 1909. The jury law in force at that time provided that the jurors should be selected from a box containing the names of the qualified jurors of the county. By Laws 1909, chap. 73, page 131 (Rem. & Bal. Code, § 94), the method of selecting jurors was changed, as well as their qualifications, the new law providing for an additional qualification in that the juror should be a taxpayer, and further providing that each

county should be divided into not less than three nor more than six jury districts; that in July of each year the county clerk should make up a list of all the qualified jurors in the county, ascertaining the residence of each juror, and deposit his name in the jury box of the district in which he resided; that whenever a jury should be called in any county, the names of the jurors should be drawn in equal number from each jury box. This law went into effect in June, and the jury before whom appellant was tried was selected as provided for in the new act, Pierce county having, in accordance with the provisions of the law, been divided into three jury districts.

The appellant contends that the portion of the act dividing counties into jury districts is unconstitutional and void. We are aware of no provision of the constitution which this law violates. Article 1, section 22, of the constitution grants to each person accused of crime "a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." The law in question does not attempt to provide for a jury from any division or district less than the whole county. The names of all the qualified jurors of the county are placed in boxes, arranged according to the district in which the juror may reside, and the jury, when drawn by the clerk for service in any month, is drawn in equal numbers from each box, thus providing each litigant and each person accused of crime a jury drawn from the entire county and not from any particular section or division of the county. Under the old law it would have been possible for all the jurors selected in any one month to come from the same section of the county. Had the old law been in force, appellant might have been tried before a jury all of whom resided in Tacoma, or in the precinct in which his crime is alleged to have been committed, and thus great difficulty been encountered in selecting a jury free from local prejudice. Under the law such a condition cannot

exist, the jurors in equal numbers representing the three jury districts, and the opportunity for obtaining a jury free from local prejudice greatly increased. Such a jury is undeniably "a jury of the county."

Under the old rule of the common law, the jury was required to come from the vicinage or neighborhood of the place where the crime was alleged to have been committed, or the cause of action, if civil, arose; and it was a ground of challenge if some given number were not summoned from the hundred in which such place lay. This rule was gradually changed until the law was satisfied if the jury was returned from any part of the county; and the words "jury of the county," as used in our constitution, have never been held to mean more than that the jurors, when summoned, should come from some part of the county. The constitution, then, granting to appellant a trial before "a jury of the county," the jury before whom he was tried having been drawn from boxes containing the names of the qualified jurors in certain designated sections of the county, but the boxes together containing the names of all the qualified jurors of the county, and the panel being drawn in equal number from each box, the jury thus selected could be nothing less than "a jury of the county," and appellant's constitutional right to such a jury has in no sense been limited or abridged. The constitution of the United States, by the sixth amendment, provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

Section 802, U. S. Rev. Stats., provides:

"Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

The constitutionality of the latter statute has been sustained in the following cases: *United States v. Stowell*, 2 Curt. 153; *United States v. Richardson*, 28 Fed. 61; *United States v. Chaires*, 40 Fed. 820; *Agnew v. United States*, 165 U. S. 36.

It is contended in this connection that the new jury law is an *ex post facto* law, and for such reason bad. We cannot so hold. We know of no definition of an *ex post facto* law which this law violates. *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029. It has never been doubted but that the legislature has ample power to make changes which affect only the remedy or method of procedure. These are not among the guaranties of the constitution in which litigants in civil actions or persons accused of crime can be said to have a vested right. The manner of selecting jurors from the body of the county, the impaneling of a jury in any given case, the qualifications necessary, the grounds of challenge,—all these are merely regulative in their nature and belong to the matters affecting only the procedure under which the case or crime may be tried, and not the crime itself. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492, wherein it is said:

"While the constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury. . . . While no *ex post facto* law is valid, this has no application to the rules of evidence or the details of the trial."

The same rule is announced in Cooley's Constitutional Limitations (6th ed.), p. 326:

"But so far as mere methods of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken

place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose."

Much the same language is used by the court in *People v. Mortimer*, 46 Cal. 114, and the cases announcing a like rule are almost too numerous to mention. Counsel for appellant, upon this charge of unconstitutionality, seems to lay great stress upon the opinion of this court in *State ex rel. Lytle v. Chehalis County*, 54 Wash. 278, 103 Pac. 464. We can find no common ground between the two cases. In that case the question discussed was the constitutionality of the act dividing counties into separate judicial districts, contrary to what we held to be the inhibition of the constitution in providing but one superior court in each county. There is no method provided for in the constitution for summoning jurors, nor does it attempt to define their qualifications. Hence such matters can be safely and properly left to legislative enactment.

It is next contended that the defendant should have been discharged for failure to serve a copy of the information upon him. This assignment is disposed of in what was said in *State v. Quinn*, 56 Wash. 295, 105 Pac. 818, where the same failure was held to be neither jurisdictional nor erroneous. We do not care to discuss the matter further.

The next assignment is made in connection with juror Horton Hall, or Hall Horton. In the list of jurors drawn for October appears the name of Hall Horton, residing in the second precinct of the 1st ward, Tacoma. Under such name an individual was summoned by the sheriff from such residence, and was called by such name to sit upon the jury being impaneled in this case. In response to the call "Hall Horton," the juror took his seat in the jury box. He was examined fully as to his qualifications, by both the state and the defense. Neither counsel asked his name. Being satis-

factory to both, he was accepted and sworn and sat as a juror throughout the trial. When he drew his warrant for services as such juror he receipted for the same as "Hall Horton, by Horton Hall." Appellant now contends such juror was not qualified, and his participation in the trial and rendition of the verdict should be ground for reversal.

We assume, from the fact that this juror was accepted by both the state and the defense, that he was in all respects competent and qualified to act as a juror. His name, whether Hall Horton or Horton Hall, neither added to nor detracted from those qualifications. The venire under which he was summoned called for an individual, not a name. That individual was described as residing at a particular place. As such individual he was summoned, appeared, and served. The individual intended to be served was actually served, the identical individual served appeared, and the same individual who appeared was drawn into the jury box and served. The person was in each instance the same. There was no confusion nor commingling of identities. It was an individual or person who was served and intended to be served; not a name. Each individual or person for convenience of designation is generally known by a distinct name, but the name does not make the person; it merely designates or labels him. The individual is the same, whatever the name may be. He may be known and called by as many different names are there are communities in which he may from time to time reside, but the individual does not change as does his name. He is the same in each instance. Appellant was entitled to be tried by a jury of twelve fair and impartial individuals or persons of Pierce county, possessing the qualifications of jurors. So far as this assignment goes, there is nothing to show that he was not.

Dr. Silliman was called as a medical expert by the defense, and the state in rebuttal called witnesses to impeach him upon his general reputation for truth and veracity. The ruling of the court in permitting such testimony over de-

fendant's objection is assigned as error. This is untenable. A medical expert, or any other expert, is subject to the same rule of impeachment as any other witness. He occupies no higher plane than the ordinary witness, nor does he stand on any different footing. The only difference is that he may be interrogated along hypothetical lines; otherwise he is subject to the same methods of examination and must subject himself to the same test of credibility.

Error is next predicated upon a charge that, after the examination of the jurors on their *voir dire* had been completed, a recess was declared, and that during this recess the jurors were permitted to separate. This was before the jury was sworn to try the case. This was not error. The statute providing that juries in criminal cases shall not be allowed to separate applies only to the jury selected and sworn to try the cause. Until that time has arrived, there is no jury within the purview of the statute. *State v. Clark*, *ante* p. 128, 107 Pac. 1047; *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620.

It is next contended that, on May 14, 1909, when it is charged this crime was committed, murder was not a crime within the state of Washington. On March 22, 1909, what is now known as the new criminal code was approved by the governor, and became a law subject to the ninety-day provision of the constitution, which made the laws embraced in that code effective on June 8, 1909. Laws 1909, p. 890, ch. 249 (Rem. & Bal. Code, § 2253 *et seq.*). It is contended that, upon the passage of this new act, which defined murder in the first degree, the crime with which appellant was charged, the old statute defining such crime was repealed with no saving clause. So that, between March 22 and June 8, there was an open season for murder. We cannot subscribe to such a contention. Appellant is not justified in his contention that the act of 1909 contains no saving clause. Section 42 of the act of 1909, Laws 1909, p. 901 (Rem. & Bal. Code, § 2294), reads as follows:

"Nothing contained in any provision of this act shall apply to an offense committed or act done at any time before the day when this act shall take effect. Such an offense shall be punished according to, and such act shall be governed by, the provisions of law existing when it is done or committed, in the same manner as if this act had not been passed."

This is amply sufficient as a saving clause for all crimes committed between March 22 and June 8. Similar statutes have invariably been held good and sufficient as saving clauses. *Sanders v. State*, 77 Ind. 227; *United States v. Kohnstamm*, 5 Blatchf. 222; *People v. Gill*, 7 Cal. 356. Even though it could be held that this section was insufficient, we still have chap. 6 of the extraordinary session of 1901, page 13 (Rem. & Bal. Code, § 2006), which in effect is a general saving clause applicable to the repeal or amendment of all criminal statutes, unless a contrary intention is expressly declared therein. The validity of this act has been sustained in *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. 897, and *State v. Ames*, 47 Wash. 328, 92 Pac. 137, and was lastly given effect by this court in the review of a contention similar to that now before us in *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388.

The remaining errors go to the giving and refusing to give certain instructions. We have referred to the fact that no statement of facts nor bill of exceptions has been brought up. It has been the uniform holding of this court that instructions either given or offered and refused will not be reviewed, unless the same are preserved by statement of facts or bill of exceptions, except when the charge or request to charge is made wholly in writing. We have also held that, where the bill of exceptions does not contain all of the instructions given, the particular instructions complained of will not be reviewed, it being presumed that the error, if any, was cured by other parts of the charge; further, that instructions cannot be reviewed unless the evidence to which they pertain is

before us. *Thompson v. Territory*, 1 Wash. Ter. 547; *Cunningham v. Seattle Elec. R. Co.*, 3 Wash. 471, 28 Pac. 745; *Medcalf v. Bush*, 4 Wash. 386, 30 Pac. 325; *Patchen v. Parke & Lacy Mach. Co.*, 6 Wash. 486, 33 Pac. 976. The so-called record before us does violence to all these holdings. It is apparent from the record we have that the court gave forty-nine and one-half instructions, as numbered by it, while appellant sends up a record containing but five instructions. Again, he takes exceptions to twelve instructions, but the instructions are not before us except as he has embodied them in his exceptions. He also excepts to the refusal of the court to give four instructions, none of which are before us except in the language of his exception. It would be altogether too loose a practice, and more conducive to committing error than curing it, if countenance was given to such a method of submitting questions to this court and asking rulings thereon, as we have no way of determining what the instructions of the court were, nor of reviewing the instructions as a whole, which is essential to reviewing any one or more of them upon an assignment of error. Notwithstanding this, the grave import of this case impels us to overlook these rules of appellate procedure, and pass upon all contentions of error, in so far as we can do so. In this view, we have examined the instructions complained of. We cannot find error in them.

In instruction 28 the court told the jury there was no evidence to justify a verdict of manslaughter. This is assigned as error and as a comment upon the facts. The evidence not being before us, we can only discuss whether or no such an instruction is ever proper. We have held that such an instruction was proper and not a comment upon the facts, in *State v. McPhail*, 39 Wash. 199, 81 Pac. 683, in which case a large array of authority is cited in support of the holding. We cannot determine whether it was error to refuse the offered instructions, as the instructions not being before us, we are unable to say, assuming them to correctly

state the law, that the court, on its own motion, or upon request of the state, did not give instructions correctly stating the law intended to be covered by the offered instructions.

We do not wish our treatment of the motion to strike such portions of the transcript as are not properly part of the record in the court below, upon the failure to have them properly included in a statement of facts or some form of bill of exceptions, to be taken as a precedent, or as overruling those cases where similar motions have been granted by this court upon like grounds. We have said the motion was well taken, but considering the nature of the case and the judgment, we have not wished to interpose any technical ruling that would prevent an inquiry into whether or no appellant has had a fair and impartial trial and been convicted only upon the full preservation of all his constitutional rights.

Upon a careful review of all the errors assigned, we find no error, and the judgment is affirmed.

Rudkin, C. J., Gose, Chadwick, and Fullerton, JJ., concur.

[No. 8811. Department One. May 21, 1910.]

HENRY HOERLING *et al.*, *Appellants*, v. R. L. LOWRY, *Respondent*.[1]

CANCELLATION OF INSTRUMENTS—DEEDS—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. There is sufficient evidence of fraud entitling the grantor to a cancellation of his deed, where it appears that he was induced to make a trade of his property for 32 lots represented to be in a city center and worth one hundred dollars a lot, when they were seven miles from the business center and not worth over a dollar a lot, that the deed was not to be delivered until he had received $2,000 on a sale of twenty of the lots to a pretended purchaser, who paid $50 without any intention of completing the purchase, and that delivery of the deed was wrongfully secured by the agent, who acted for both parties in the trade and was guilty of the frauds practiced.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 26, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to cancel a deed for fraud. Reversed.

Hayden & Langhorne, for appellants.
Reynolds & Stewart, for respondent.

MORRIS, J.—Appellants, prior to May 17, 1909, were the owners of a lot in Chehalis, upon which had been erected a fourteen-room dwelling. This property was valued at about $3,000, and had a rental value of about $60 per month. On May 17, Henry Hoerling, who with his wife was a resident of Tacoma, went to Chehalis for the purpose of selling this property. He there met S. V. Lowry, a brother of the respondent, who is in the real estate business, and after some conversation is was agreed that Lowry should act as Hoerling's agent in the sale of the property. Lowry finally suggested a trade of this property for thirty-two improved lots in Sea View Addition to Port Angeles. These lots were rep-

[1]Reported in 108 Pac. 1090.

resented as worth $100 each, cleared, close to the center of the city, and available as business property. They were owned by respondent. Hoerling, however, seemed anxious to turn his property into cash, and refused to consider a trade. Lowry then informed him that he had a purchaser for twenty of these lots at $100 each, who would pay cash, and suggested that a trade be made, Hoerling to deed the Chehalis property to the owner of the Port Angeles lots, who would then make a deed to Hoerling of the thirty-two lots, and Hoerling could then make a deed of the twenty lots to the purchaser, known to Lowry, and receive his $2,000. It was further suggested that all the deeds be deposited in a bank, and that Hoerling's deed would not be delivered until he had received the $2,000. Hoerling, not quite satisfied with this proposition, left the office and later returned with two sons-in-law, to whom the proposition was repeated, and the name of the purchaser of the twenty lots disclosed as Martin Galogaly. The proposition was then accepted, and it was agreed that the next morning the papers would be drawn up and the deal closed.

The next morning a meeting was held at S. V. Lowry's office to close up the deal, when Martin Galogaly casually drops in and, after listening to the conversation, becomes so much impressed with the future prospects of Port Angeles and the value of these particular Sea View Addition lots, that he offers to purchase twenty of them for $2,000. He had never been at Port Angeles and knew nothing about the location of these lots except as he was then and there informed. However, he expresses his willingness to close up the transaction at once, and pays down $50, the balance to be paid in five days. A deed is then drawn from Hoerling to R. L. Lowry for the Chehalis property, a deed from R. L. Lowry and E. G. Lowry to Hoerling for the Port Angeles lots, which deed seems to have been executed in blank the day before, and a deed from Hoerling to Galogaly for the twenty lots. These deeds upon their execution were deposited in a

bank, to await the payment by Galogaly to Hoerling of the $1,950 due upon the Port Angeles lots. On the 21st, S. V. Lowry presents to the bank a written order for the delivery of the deed to the Chehalis property, and upon receipt of the same has it promptly recorded. Hoerling denies that he knowingly signed such an order. The five days elapse, and the $1,950 not being paid, Hoerling returns to Chehalis, and believing that he had been defrauded out of his property, later commenced this action to cancel and set aside his deed to respondent.

It is not strange that, in an action of this character, there should be some conflict in the testimony; but the facts heretofore recited we believe to be abundantly established. Other facts we believe established, are these: Galogaly never had any intention of paying the remaining $1,950. It is apparent from his testimony that he had no money; in fact, he says he expected to borrow it; but so far as the record discloses, he does not seem to have made a very earnest effort to do so. He seemed to lose all his interest in the transaction after the execution and delivery of the deed from Hoerling to Lowry. The Port Angeles lots are situated about seven miles from the business center of the city. There is some conflict as to their situation, and values are given from fifty cents a lot to $75. R. L. Lowry purchased them about two years ago at one dollar per lot. We think from the record he would not have been justified in paying more.

We do not deem it necessary to recite the facts further, nor to refer to any authority upon which to base our conclusion that this transaction was so tainted with fraud, both in law and fact, as to render it voidable. S. V. Lowry was the agent of both parties; he represented appellants in finding a purchaser for their property; he represented his brothers in seeking to effect an advantageous trade for the Port Angeles lots; he was not in a position to give appellants the benefit of an honest discretion in advising an exchange of their property for his brothers' vacant lots; such a dual

relation on his part under the general equitable rule would make the contract influenced by him voidable. We see no facts in this record which would suggest any exception to such rule, or suggest that this is not a proper case for its application.

We might refer to other well recognized principles of law that apply to cases of this character. They will, however, readily suggest themselves to those who read the law. Appellants were entitled to the relief they sought.

The judgment is reversed and the cause remanded with instructions to enter the decree prayed for.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8618. Department One. May 21, 1910.]

J. S. EVANS, *Respondent*, v. OREGON & WASHINGTON RAILROAD COMPANY, *Defendant and Respondent*, M. W. DIBBLE *et al.*, *Appellants*.[1]

CONTRACTS—ORAL RESCISSION—CONSIDERATION. Where a subcontractor refused to perform and was about to abandon a written contract, the contract may be orally rescinded, and the principal contractor's oral agreement to pay an additional sum is not without consideration or *nudum pactum*, but an election to make a new contract rather than recover damages.

TRIAL—VERDICT—SPECIAL DAMAGES—INCONSISTENCY—CONTRACTS—CONSIDERATION. In an action by a subcontractor to recover additional compensation promised him after undertaking the work, a special finding by the jury that the consideration for the promise was the fact that the principal contractors were under bond to complete the work within a stated time does not control a general verdict for the plaintiff, where the jury were instructed that they must find some consideration for the promise and that one promise is a good consideration for another; since (1) the consideration for the promise was a legal question for the court, (2) the special finding implies that the minds of the parties met and that mutual promises were made, and (3) the consideration found was sufficient.

[1]Reported in 108 Pac. 1095.

APPEAL—REVIEW—PARTIES ENTITLED. Railroad contractors, upon appeal from a judgment against them in favor of a subcontractor, cannot urge error in the granting of a nonsuit as to the railroad company, joined with them as defendants in the action.

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be set aside when supported by sufficient direct and circumstantial evidence.

APPEAL—PRESERVATION OF GROUNDS—ESTOPPEL. Where appellants requested an instruction that a preponderance of the evidence was sufficient, they cannot complain of the failure of the court to instruct that it requires clear, positive, and satisfactory evidence to establish a rescission of a written contract.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 11, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Ellis, Fletcher & Evans, for appellants, cited: *Price v. Mitchell*, 23 Wash. 742, 63 Pac. 514; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873; *King v. Duluth M. & N. R. Co.*, 61 Minn. 482, 63 N. W. 1105; *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804; *Jones v. Risley*, 91 Tex. 7, 32 S. W. 1027; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S. W. 844; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377.

L. H. Schellbach and *Hayden & Langhorne*, for respondent.

GOSE, J.—Prior to August 12, 1907, the appellants entered into a contract with the respondent Oregon & Washington Railroad Company, for grading a part of its roadbed in Lewis county. On that date the appellants entered into a written contract with the respondent Evans, by which they sublet to him a portion of the work. The respondent Evans commenced work under his contract, but finding that the compensation agreed upon was inadequate, abandoned the work.

The following day, at the instance of the division engineer of the railroad company, a Mr. Abbott, Evans and Abbott went to see the appellant Dibble, and informed him that Evans was dissatisfied and had quit work. Evans then complained of the refusal of the appellants to pay a certain bill, and further said to them that he did not want to resume work because he had struck gumbo, and could not make anything. Abbott insisted that he should go on with the work, and stated in the presence of the appellant Dibble that, if he would continue and complete the work, "we will see that the bills are paid and you get a reasonable wage." Dibble was present, but said nothing further than to discuss the bill. The respondent Evans then resumed and completed the work, and upon the refusal of the parties to pay a portion of the bills and his wages, brought this suit against his co-respondent and the appellants to enforce the oral contract. At the close of his testimony, a motion for a nonsuit was granted as to the railroad company and denied as to the appellants. There was a verdict and judgment in favor of the respondent Evans against the appellants, and they have appealed.

The first point suggested by the appellants is that the oral contract, if made, was without consideration and not enforcible. It is insisted that neither the promise to do, nor the doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a contract in his favor. We cannot assent to this view of the law. We think the better rule is that, where a party has breached his contract and refused to perform it, it is optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated, and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject-matter to be performed, in the same or a different way, upon a different consideration. In the case at bar, the appellants had contracted to do certain work, and

it was important to them that the work that Evans had agreed to perform should go forward. When he abandoned the work, they had the election to hold him answerable in damages or to make a new contract with him. They chose the latter course, and cannot now be heard to say that the contract was *nudum pactum*. This view has abundant support in the authorities.

"Where the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the continued performance of the contract, the authorities are not in accord on the question whether the promise for additional compensation is supported by sufficient consideration. The prevailing rule seems to be, however, that such a promise is valid as an abandonment of the original contract and the creation of a new contract." 30 Am. & Eng. Ency. Law (2d ed.), p. 1197.

"The release of one from the stipulations of the original agreement, is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect." *Rollins v. Marsh*, 128 Mass. 116.

In *Rogers v. Rogers & Bro.*, 139 Mass. 440, 1 N. E. 122, it was held that, where one party has agreed to sell, and the other has agreed to buy, certain goods at a stipulated price, and the seller delivers a part of the goods but refuses to deliver the remainder except at an advanced price, the agreement of the purchaser to pay the increased price is binding upon him upon the delivery of the goods. In *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, in an opinion by Judge Cooley, it was held that, where an ice company had contracted to deliver ice to a brewing company at a given rate, and owing to a shortage in ice, refused to complete the contract unless a higher rate was paid, a note given by the brewing company for the ice at the increased price was based upon a sufficient consideration. In *Foley v. Storrie*, 4 Tex. Civ. App. 377, 23 S. W. 442, the plaintiff had agreed to deliver to defendant one thousand cords of wood at four

dollars per cord. Owing to the advance in wages, the plaintiff found that he could not make a profit on the contract, and so advised the defendant. Thereupon it was agreed that the defendant would pay five dollars per cord. The plaintiff then delivered one hundred cords, and brought suit to recover the price on the new contract. It was held that the new contract was enforcible, and that "the parties had the right to rescind their contract or to modify it by mutual agreement." In *Coyner v. Lynde*, 10 Ind. 282, the defendant agreed with the plaintiff, the original contractor, to complete a portion of his contract for the construction of a part of a line of railroad at the price plaintiff was to receive, and to pay plaintiff a premium for the privilege of the contract. Later the defendant ascertained that the contract price was inadequate, and determined to abandon the work. The plaintiff, to induce the defendant to continue the contract to completion, agreed to release him from the payment of the premium, and the defendant completed the contract. It was held that, when a party abandons his contract, the adverse party has his election to sue or make a new agreement and, if in the new agreement he makes new or additional promises dependent upon the fulfillment of the contract, and the party abandoning the contract in consideration of the new promises completes the work, the promise is binding. In *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475, the plaintiff undertook to construct a cartway for the sum of $900. After beginning the work he ascertained that the price was inadequate, and determined to abandon the contract. Whereupon, the defendant orally agreed to release him from the contract and pay him by the day, if he would complete the work, which he did; and in an action to recover upon the second contract, it was held binding. The same principle is announced in *Cooke v. Murphy*, 70 Ill. 96; *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197, 47 Am. St. 465, 34 L. R. A. 33, and *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308.

The rule contended for by the appellants was criticized by this court in *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798, the court saying that it was not in accord with ethics, and ought not to be in accord with the law, to allow a creditor to compromise a debt for a less sum than the amount due, receive a sum of money on the compromise, and then permit him to repudiate the compromise and retain the benefits. We think the view we have expressed is supported by the reasoning of this court in *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. It must be conceded, however, that the courts are not agreed upon this question, and that judges of the highest ability have announced the view urged by the appellants. The view we have taken will permit greater freedom in contracting, and is, we think, more in harmony with the fundamental conception of contracts.

The court instructed the jury that they must find "that there was some consideration for the contract," and that "one promise is a good consideration for another promise." The respondent Evans did not except to this view of the law. The following interrogatory was propounded to the jury:

"If you find from the evidence that there was an oral agreement entered into between the railroad company and Dibble-Hawthorne company and the plaintiff, wherein the said defendants agreed to pay the plaintiff all past bills incurred, all future bills to be incurred in the prosecution of the work, and a reasonable wage to himself, state what the consideration for such promise was to the defendants Dibble and Hawthorne."

The jury answered:

"The fact that Dibble and Hawthorne were under bond to complete the work within a stated time."

The appellants insist that the answer is in conflict with the instructions of the court, and that their motion for a judgment notwithstanding the verdict should have been granted. The contention is untenable, for three reasons: (1) If the parties made an oral contract, the sufficiency of

the consideration was a legal question for the determination of the court, and not a fact for the consideration of the jury; (2) the answer to the interrogatory necessarily implied that the minds of the parties met and that the oral contract was made, thus falling within the instruction that "one promise is a good consideration for another;" and (3) the consideration found was a sufficient consideration and within the evidence.

It is insisted that the court erred in submitting the case to the jury as to the appellants, and withdrawing it as to the railroad company, and that there is not sufficient evidence of the oral contract to support the verdict. The respondent is not complaining of the action of the court in granting the nonsuit in favor of the railroad company. Obviously he is the only party injured thereby. In addition to the facts stated, there was evidence tending to show that, after making the alleged oral contract, the appellants kept the time of the men employed by Evans; that they did not do so before that time, and that they thereafter paid five bills for supplies, such as milk, hay, meat, and powder, which Evans had contracted in the prosecution of the work, aggregating over $500. They were not required to pay these bills, under the written contract. The appellants stoutly denied making the oral contract, but admitted paying the bills mentioned, explaining that they did so, not as a duty, but at the request of Evans, when there was money due him. There is sufficient evidence, direct and circumstantial, to support the verdict. On the other hand, the jury might properly have found for the appellants. The issue was sharply drawn, and was determined adversely to the appellants upon sufficient evidence, and they must abide the result.

The authorities cited in the reply brief, holding that it requires clear, positive, and convincing evidence to establish the rescission of a written contract, have no application here, the court, at the instance of the appellants, having instructed

that a preponderance of evidence was sufficient to establish that fact.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8676. Department One. May 21, 1910.]

JULIA HOWELL *et al.*, *Respondents*, v. JOHN WINTERS, *Appellant*.[1]

ASSAULT AND BATTERY—CIVIL ACTION—DEFINITION—INSTRUCTIONS. An assault is sufficiently defined by an instruction to the effect that it may be found where one shook his fist in the face of another in such proximity that he could have struck such person, or near enough to produce a feeling on the part of such other person that he might be struck; the presence or absence of an assault depending more upon the apprehension created than the undisclosed intent.

SAME—JUSTIFICATION—INSTRUCTIONS. In an action for an assault committed in defendant's store, the right of the defendant to remove the plaintiff from the store is sufficiently stated in an instruction to the effect that defendant had a right to request the plaintiff to leave, and to use sufficient force to eject her, but that her refusal to leave would not justify an assault; especially where the assault was not committed in removing the plaintiff.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 29, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for an assault. Affirmed.

W. H. Abel, for appellant.

Morgan & Brewer, for respondents.

RUDKIN, C. J.—On the 7th day of July, 1909, the plaintiff Julia Howell visited a store conducted by the defendant, John Winters, and his brother, in the city of Hoquiam, for the purpose of returning a corset purchased by her husband

[1]Reported in 108 Pac. 1077.

a few days before, and securing a return of the purchase price. The defendant and his brother denied that the purchase was made in their store, and refused to accept the corset or refund the money. In the controversy that arose between the parties over the return of the money, the plaintiffs contend that defendant assaulted the plaintiff Julia Howell and used vile and opprobrious language towards her, for which damages were sought in this action. The jury returned a verdict in favor of the plaintiffs in the sum of $1,200. On motion for a new trial, the court required them to remit the sum of $700 from the verdict, and, the remission being made, a judgment was entered for the residue, from which this appeal is prosecuted.

In its charge to the jury the court defined an assault as follows:-

"An assault is an action, or conduct, on the part of the defendant, for instance—if you believe her testimony that he shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have struck her, also near enough to produce a feeling on her part that she might be struck—that would be an assault. Then of course if he did strike her that would be an assault and battery. She may recover in case you only find assault, or in case you find assault and battery, if you find it was made unlawfully and under the circumstances I have mentioned."

Upon this instruction the first error is assigned. It may well be doubted whether an erroneous definition of the term assault would be prejudicial in this case, for all the testimony on the one side tended to show an actual battery, while the testimony on the other side tended to refute either an assault or a battery. But regardless of this, we think the definition as given is substantially correct. An assault was formerly defined by our statute as, "An attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." Rem. & Bal. Code.

§ 2746. This section was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act. We must therefore look to the common law for a definition. Cooley defines the terms thus:

"An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; 'A right to live in society without being put in fear of personal harm.' " Cooley, Torts (3d ed.), p. 278. See, also, *Commonwealth v. White*, 110 Mass. 407; *Mailand v. Mailand*, 83 Minn. 453, 86 N. W. 445; *Morgan v. O'Daniel*, 21 Ky. Law 1044, 53 S. W. 1040. The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault.

It is next contended that the court refused to define or explain the right the appellant would have to remove the respondent Julia Howell from his store. In this connection the court charged the jury as follows:

"I will instruct the jury that he would have a right to request her to depart, but the fact that she did not comply with the request would not justify him in making an assault. He might, after proper request, use sufficient force to put her out of the store; he would have a right to do that, but he would have no right to make an assault of the kind I have described nor an assault and battery as I have described."

It seems to us this charge is correct and was ample and

sufficient for the guidance of the jury. Furthermore, if an assault or an assault and battery was actually committed, there is no pretense that it was committed in the removal of this woman from the store.

It is lastly contended that the verdict is still excessive, but if we accept the testimony on the part of the respondents as true, the verdict as reduced by the trial court is sustained by competent and sufficient testimony. The judgment is therefore affirmed.

FULLERTON, GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8808. Department One. May 21, 1910.]

R. C. TURNER *et al.*, *Respondents*, v. JOHN S. CREECH *et al.*, *Appellants*.[1]

APPEAL—REVIEW—TRIAL—FINDINGS. Upon appeal the supreme court will not recast conflicting and confusing findings of the trial court, in order to harmonize them.

BOUNDARIES—CONFLICTING CALLS—SHORTAGE—QUANTITY—LOCATION. Where the owner of the northern portion of lots supposed to be 130 feet long, but the north line of which projected into the street, conveyed a strip 6 2-3 feet wide to the owner of the south 43 1-3 feet of the lots, the description starting from a point 80 feet south of the northwest corner, and the strip was surveyed and marked upon the ground and the vendee took possession and made improvements, ejectment cannot be maintained by the grantor or his subsequent grantee to recover part of the strip conveyed upon ascertaining that the lots were only 128.2 feet long, although it was the intention by the conveyance to reserve 80 feet in the northern tract.

SAME—ACTS OF COMMON GRANTOR. The location of a boundary line by a common grantor is binding upon the grantees.

SAME—QUANTITY—BEGINNING POINT. Where a quantity is of the essence of the contract, it controls courses in the description, the beginning point of which is of no higher dignity than other calls.

SAME—LOCATION—POSSESSION—ACQUIESCENCE. Practical or agreed location of boundaries, acquiesced in or acted upon by the placing of improvements, controls the calls of a deed.

[1]Reported in 108 Pac. 1084.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered September 25, 1909, upon findings in favor of the plaintiffs, in an action of ejectment, after a trial on the merits before the court without a jury. Reversed.

John C. Hogan, for appellants.
Boner & Boner, for respondents.

CHADWICK, J.—In June, 1901, appellants Creech and wife were the owners of the south forty-three and one-half feet of lots 1 and 2, block 6, Weatherwax & Benn's Addition to Aberdeen. This tract was occupied as a dwelling place, and was inclosed with a fence. The lots were platted, each fifty by one hundred and thirty feet. The remainder of the lots was owned by one Harriet Dutcher. Appellants in that year purchased from Mrs. Dutcher six and two-thirds feet, lying along their north line. The tract was surveyed and staked, and appellants' fence was put upon the line as marked by the surveyor and agreed upon by the parties. The description in the deed is as follows:

"Commencing at the northeast corner of lot one (1) in block six (6) in Weatherwax and Benn's Addition to the Town now City of Aberdeen, thence southerly along the easterly line of said lot one (1) eighty (80) feet to point of beginning; thence westerly parallel with Fifth street, one hundred (100) feet to the westerly line of lot two (2) in said block six (6); thence southerly along the westerly line of said lot two (2) six and two-thirds (6 2-3) feet; thence easterly parallel with said Fifth street one hundred (100) feet to the easterly line of said lot one (1); thence northerly, along the easterly line of said lot one (1) six and two-thirds (6 2-3) feet to point of beginning."

Thereafter appellants extended their dwelling house so as to cover a part of the six and two-thirds foot strip. On May 4, 1905, Mrs. Dutcher sold and conveyed to respondents the portion of the lots 1 and 2 then owned by her, describing it as the northerly eighty feet of lots 1 and 2. Respondents entered into possession of the land and have ever since, and

are now, occupying it as a home. At the time respondents moved onto the land, it was inclosed by a fence, the two lots making two tracts, one fifty by one hundred, and the other eighty by one hundred. In June, 1908, the city of Aberdeen undertook the permanent improvement of Fifth street which abutted on the north of the Turner property, and at that time the city surveyor determined that the Turner property encroached one and one-tenths feet upon Fifth street. These figures were accepted by the respondents, and they shortly thereafter began this action to eject appellants from the north one and eight-tenths feet of their tract, upon the theory that, inasmuch as Mrs. Dutcher had intended to reserve eighty feet to herself at the time she made the deed to the six and two-thirds feet, the shortage in the lots should fall upon these appellants.

Appellants, answering, denied the ownership of respondents, and set up title in themselves. They also pleaded a mutual mistake, in that Mrs. Dutcher and these appellants believed, at the time their deed was executed, that the lots were one hundred and thirty feet long, and not one hundred and twenty-eight and two-tenths, as would result if the figures of the city engineer are accepted. The court found that, although the official plat shows the lots to be one hundred and thirty feet long, they are in fact one hundred and twenty-eight and two-tenths feet; and that Mrs. Dutcher intended to, and did, retain the northerly eighty feet for herself, and intended to convey to appellants only the land lying between her eighty feet and the property then owned by them; that both supposed this strip to be six and two-thirds feet, but that in fact it was one and two-tenths feet less than the estimated width. At the request of appellants, the court also found that, according to the official plat as recorded in the office of the auditor of Chehalis county, the lots were one hundred and thirty feet in length; that, after platting the land, Samuel Benn and wife, who were then the owners, conveyed the whole of said lot in three distinct parcels, each

forty-three and one-third feet wide, the grantor of these appellants acquiring the southerly forty-three and one-third feet; that Mrs. Dutcher thereafter acquired the northerly eighty-six and two-thirds feet.

The findings of the trial court are confusing, if not actually contradictory of the facts upon which the decree must rest if sustained. This consequence is not unusual where each party submits findings, and the paragraphs are severally marked "found" or "refused," by the court. Dual findings upon the same subject are bound to follow, and they but lead to confusion, and contradictions are almost sure to creep in. Proper practice demands that findings of fact and conclusions of law come to us in some concrete form. This court cannot, and it should not, be put to the burden of winnowing out, recasting, or rewriting the findings of trial courts in order to harmonize them so that we may follow the theory of the trial judge. A complete and perfected set of findings should be prepared after they have been settled by the court.

Error is assigned in that the court refused to permit one E. N. Simms, a son of Mrs. Dutcher, now deceased, to testify as to the intent of his mother at the time she executed her deed to appellants; that erroneous conclusions of law were drawn from the facts found; and that the court erred in making certain findings proposed by respondents and rejecting other findings proposed by appellants. As we view the case, it is unnecessary to discuss any other than the second assignment of error. Mrs. Dutcher was the common grantor of these parties, and it will not be denied that they are bound by her conduct. At the time the deed to the six and two-thirds feet was executed, the parties were acting in the utmost good faith, neither one doubting the exact location of their lines. It was the intent of the one to take fifty feet and the other to retain eighty feet. The equities up to this point were equal. But the parties went further and employed a surveyor who marked the boundaries of the land, and, indeed, at that time the original corner stakes were at the northeast corner

of lot 1 and also at the southeast corner. The surveyor ran his lines from these points and marked off fifty feet from the southeast corner and eighty feet from the northwest corner. In describing it, for convenience he fixed the northeast corner as the place of beginning, but the fact remains that a certain tract of land was laid out and agreed upon. Mrs. Dutcher put her grantees in possession. She permitted them to build a fence on the line agreed upon, and the house to be extended over the strip conveyed; so that, if it now diminished in quantity, not only the fence, but the wall and eaves of the house would have to give way to the new line. Clearly, Mrs. Dutcher could not recover in ejectment; and, if she cannot, the respondents, having notice of the claims of appellants, cannot recover. The location of a line by a common grantor is binding upon the grantees. *McGee v. Stone*, 9 Cal. 600; *Ross v. Turner's Lessee*, 5 Yerg. (Tenn.) 338; 5 Cyc. 940. Possession is notice. *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210; *Kuhl v. Lightle*, 29 Wash. 137, 69 Pac. 630; *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 Pac. 585.

Some point is made over the description in that it commences at the northeast corner of lot 1 and runs thence southerly eighty feet to the point of beginning. We have already said enough to show that, in our judgment, this can make no difference. The beginning point of a survey is of no higher dignity or importance than any other. *Davis v. Smith*, 61 Tex. 18. The case falls within the rule of practical location or agreed boundaries. To discover the true intent of a deed we must look to the whole of it, as well as the acts of the parties. Reference to the whole description will show that the primary intent of the grantee was to buy, and of the grantor to sell, six and two-thirds feet, and the fact that the true northeast corner of lot 1 was one and eight-tenths feet south of the point fixed by the surveyor will not be allowed to overcome the acts of the parties.

"A surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own. . . . It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts." *Jones v. Lee*, 77 Mich. 35, 43 N. W. 855.

See, also, *Miller v. Mills County*, 111 Iowa 654, 82 N. W. 1038. The conveyance of the strip six and two-thirds feet by fifty was the essence of the contract, and the quantity of the land to be conveyed will control in such cases, although the call of the deed might not include the whole tract. 3 Am. & Eng. Ency. Law (2d ed.), 790, 791. Practical or agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by the parties, as where valuable improvements are placed with reference to it and before it is denied by either party. 5 Cyc. 930 *et seq.*

In *Flynn v. Glenny*, 51 Mich. 580, 17 N. W. 65, it was held that purchasers of town lots have a right to locate their lot lines according to the stakes set by the plattor of the lots, and that no subsequent survey can unsettle such lines, Mr. Justice Cooley saying:

"The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them."

For the reasons herein assigned, the judgment of the lower court is reversed, with instructions to enter a decree upon the findings heretofore found in favor of appellants.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8447. Department One. May 23, 1910.]

TACOMA EASTERN RAILROAD COMPANY, *Appellant*, v. HERMAN SMITHGALL *et al.*, *Respondents*.[1]

EMINENT DOMAIN—PUBLIC NECESSITY—FINDING—CONCLUSIVENESS—ANSWER. After an adjudication of public use and necessity in a condemnation proceeding, an answer alleging that the appropriation was sought for other and ulterior purposes is irrelevant, and it is error to refuse to strike it out, where its manifest purpose and tendency was to prejudice the jury.

SAME—RIGHTS TO BE ACQUIRED—STIPULATION—DAMAGES. A railroad company seeking to condemn a right of way, may, when the owners making an unanticipated claim to special damages by reason of injury to a reservoir site and water power, limit the rights sought to be acquired by filing a stipulation or waiver respecting the use of the site, thereby reducing the special damages claimed; and it is error to refuse to instruct the jury that they should take the stipulation into consideration in determining the amount of the award.

WATERS AND WATER COURSES—RIPARIAN RIGHTS. An upper riparian owner may not impound all the waters of a natural water course for fourteen hours out of every twenty-four without the consent of lower proprietors or the condemnation of their rights.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 11, 1909, upon the verdict of a jury assessing damages in a proceeding to condemn land for railroad purposes. Reversed.

Hayden & Langhorne, for appellant.

A. H. Garretson, for respondents.

RUDKIN, C. J.—This proceeding was instituted by the Tacoma Eastern Railroad Company to condemn and appropriate a right of way 100 feet in width through certain lands owned by the defendants, for railroad purposes. The jury returned a general verdict in favor of the defendants in the sum of $1,822.66, accompanied by the following special findings:

[1]Reported in 108 Pac. 1091.

"First, What do you find to be the damage to the land in question, by reason of the taking of that part thereof by these proceedings in the ordinary natural state, irrespective of the proposed reservoir and the flow of water and granite quarry thereon located?

"Second. What damages do you find in addition to the taking of the land in question by the plaintiffs herein, as asked for in addition to what the defendant would suffer, were the land in its natural condition devoid of water and the granite quarry thereon?

"Third What damages do you find the defendant is entitled to recover by reason of the taking of the land by the plaintiff in these proceedings on account of the granite quarry, irrespective of the land in general and the flow of water?

"Fourth. Do you consider in the making up of the estimate that the value of said granite quarry is largely increased, owing to the natural flow of water upon the premises, sought to be taken by the plaintiff herein, and the reservoir facilities for the storing thereof? If so, what increased amount do you place upon said quarry by reason of water facilities over and above what the normal value of the quarry would be without the use of said water for working purposes."

"Answers to Special Interrogatives: (1) $283.50. (2) $539.16. (3) None. (4) Yes—$1,000."

A motion for a new trial was denied, and from a judgment on the verdict, this appeal is prosecuted. The facts, so far as deemed necessary to a proper understanding of the errors assigned, will appear in the course of the opinion.

On the 30th day of August, 1909, an order was entered, adjudging that the contemplated use was a public one, and that the public interests required the prosecution of the enterprise. Thereafter, and at the opening of the trial before the jury, the respondents tendered and filed an answer containing the following allegations:

"That the land herein sought to be condemned is not being taken by the petitioners, for the sole reason that they require the same for a more appropriate right as to interfere, with, delay and in part destroy the efficiency and use of re-

spondents' land for the purposes hereinafter mentioned. And is therefore unreasonable, unnecessary and not a proper taking of the land as contemplated by its right of eminent domain.

"That the respondents believe and allege that the said line is being located and built in large part, as to destroy the efficiency and use of a valuable water power, now being and existing on the respondents' land. In that they have run their lines against the protest of these respondents, through and across respondents' proposed reservoir sight on said land, and that if petitioners are permitted to carry out their plans, it will destroy in large part, the efficiency of the water power thereon existing. In that it would destroy the reservoir site, preventing the proper storage of water in the reservoir therein contemplated.

"That the respondents have upon this property a valuable quarry of merchantable granite, which can, by the proper use of the aforesaid water now existing upon said land, be quarried, mined, worked, finished and polished, and that ample power for the same can be so maintained as to make said quarry very valuable to the respondents, if unmolested as contemplated by the railroad company, petitioner herein.

"That the railroad company has already sufficient right of way, and is now operating its line over said road, as selected by its engineers as the best and most practical route for its road. That at nowhere in its petition has the said railroad company declared its intention of abandoning its former route, and that to run a second line through the land, cuts it into three separate strips, in a semicircular form, leaving the said land in an unsightly, inconvenient and almost worthless condition for agricultural purposes, and as respondents believe, for the sole purpose of injuring these respondents, without any proper recourse in damages or otherwise.

"That respondents believe and aver the fact to be that their damages in the aforesaid action, by reason of the aforesaid allegation, cannot be adequately ascertained by the jury for the reason that the said land is remote from the place of trial, so that the jury cannot personally inspect the same, and that the procuring of witnesses to testify in this cause is burdensome and expensive by reason of the fact that no one from this county can reasonably be had to go and view and

estimate the damages without great loss of time and heavy expense of travel. And therefore, this action heaps upon the respondents burdensome costs and expenses, which should be carefully considered by the jury in making up their estimate of damages."

A motion to strike this answer was interposed, but the motion was denied, and the court permitted counsel for respondents to read the answer to the jury, in the course of his argument, and to comment on its provisions, over the objection and protest of the appellant. Upon these rulings the first error is assigned. In *Seattle & M. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720, and *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669, we held that no answer is contemplated or required in proceedings of this kind, and that it is not error to strike such an answer from the files. Of course, it does not follow from this that the refusal to strike an answer in a condemnation proceeding is prejudicial error, for if the answer contains nothing improper it can do no harm. But whether an answer is proper or improper in this class of actions, the answer in question was utterly irrelevant and should have been stricken. It presented no issue, and its manifest purpose and tendency was to create a prejudice in the minds of the jury. The court had already decreed that the contemplated use was a public one, and that the public interests required the prosecution of the enterprise, and with these questions the jury had no concern. A claim before the jury that the appropriation was sought for other and ulterior purposes was entirely out of place. In *Fort St. Union Depot Co. v. Backus*, 92 Mich. 33, 52 N. W. 790, counsel for the property owner was permitted to argue to the jury that the taking of the property was unnecessary, but in reversing the judgment the appellate court said:

"It is contended, however, by counsel for respondents that the presentation of the question by argument of counsel could not have influenced the jury, as they found the question

of necessity in favor of the petitioner. I think that question is well answered by the learned circuit judge. He says: 'It is not sufficient to say that the jury found for the petitioner upon the question of necessity. This does not in any way meet the question. The petitioner was entitled to a just consideration of the question of compensation or damages to be awarded. The natural and inevitable effect of the arguments made is manifest. It would be difficult to conceive of an argument more effective, the certain and inevitable effect of which would be to influence the jury, and cause them to award the most extravagant and exorbitant damages.' The court again remarks: 'As we have seen, the jury, although judges of the law and fact, have no right to disregard well-recognized legal principles, and counsel who appear before them are governed by the same responsibility which governs them in court.' It is the duty of the court to interfere where matters foreign to the issue are rehearsed before the jury, prejudicial to the interests of a party. *Cronkite v. Dickerson*, 51 Mich. 178, 16 N. W. 371; *Bond v. Railroad Co.*, 62 Mich. 646, 29 N. W. 482; *Sullivan v. Deiter*, 86 Mich. 404, 49 N. W. 261."

The argument applies with far greater force in this state, for with us the question of necessity is determined by the court, without the aid or intervention of a jury. For this error the judgment must be reversed, but in view of a retrial of the action, the remaining assignments will be briefly considered.

A reference to the special findings of the jury will show that the general verdict is made up of three items. The first two relate to the value of the property taken and damages to the remainder of the tract. The third claim or item arises out of the following facts: The proposed right of way extends for a distance of a half mile or more through the respondents' land, along or in close proximity to the banks of a stream called Tilton river. The river has a fall or drop of about 110 feet on the respondents' land, and flows sufficient water at its lowest stage to generate 60 electrical horse power. It is further claimed that there is a natural reservoir

site on the land, in which the waters of the river can be impounded for 14 hours out of every 24, by the construction of a dam at moderate cost, thus increasing the power capacity of the stream to 145 horse power; that there is an undeveloped granite quarry on the respondents' land, across the river from the proposed right of way, containing large quantities of granite, suitable for building, paving, and other purposes; that this quarry can be operated to advantage and at a profit by the utilization of the water power in question; that the reservoir site will be destroyed by the construction of the proposed railroad grade, and that the value of the quarry will be thus impaired. As soon as these facts were made to appear, or rather as soon as this claim was advanced by the respondents, the appellant, by permission of the court, filed the following stipulation or waiver:

"The Tacoma Eastern Railroad Company, the petitioner in the above entitled action, hereby stipulates and agrees to and with the defendant in said action that said defendants may have the right to dam the waters of the Tilton River at a point on said river, below where the present located line of the Tacoma Eastern Railroad Company crosses the said Tilton River in the Southeast Quarter of the Northwest Quarter (SE¼ of NW¼) Sec. 8 Tp. 13 N. R. 5 E. W. M. said dam to be built at the head of the falls, which are situated in said river below this point, said dam not to exceed eighteen (18) feet in heighth above the lowest point in said river at the place where said dam is proposed to be located. Said Tacoma Eastern Railroad Company does hereby consent to the backing up and impounding of the waters of said river over and upon its right of way and stipulates that the construction and operation of said line of railroad will in no way interfere with the use and enjoyment of said reservoir to be constructed by said respondents.

"And petitioner agrees to and with the said Herman Smithgall and his said wife, respondents in this action, that the final decree in this case shall contain a provision wherein and whereby all the agreements contained in this stipulation shall be embodied therein, and shall be and become part and parcel of the final decree to be entered in this action."

In view of the foregoing stipulation the appellant requested the court to instruct the jury as follows:

"I instruct you that the stipulation or agreement offered and received in evidence whereby the Tacoma Eastern Railroad Co., agrees to so construct its proposed line of railway over respondents alleged reservoir site as not to interfere with the proposed use of the same is binding on the railroad company, and is to be considered by you along with all the other facts in the case, *and if you find, from the evidence, that respondents will not suffer any damages by reasons of the agreement of the railroad company to so construct its road over said reservoir site as not to interfere with the use of the same then you should not allow any sum on that account.*"

The court gave a portion of the instruction, but refused the part we have italicized; and upon this ruling the second error is assigned. Ordinarily the condemning party should describe in its petition the property it desires to take, but cases will often arise where an unanticipated claim for damages interposed by the landowner may be lessened or entirely obviated by a stipulation or waiver on the part of the condemning party. The law does not favor the taking or damaging of property for a public use beyond the necessities of the case, and if damages may be avoided by a waiver or stipulation definite and certain in its terms, which will fully protect the rights of all parties concerned, there is no reason why such a stipulation should not be received and acted upon. *Lieberman v. Chicago etc. R. Co.*, 141 Ill. 140, 30 N. E. 544; *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Ter. 38, 13 Pac. 186; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

The respondents objected to the offer of the stipulation, claiming that the appellant was attempting to pay the damages sustained by stipulation rather than in money, but such is not the case. The stipulation simply limited the estate taken and permitted a joint use of the right of way by both parties. We are therefore of opinion that the requested instruction should have been given, for if no damage resulted

to the reservoir site under the stipulation, none should be returned by the jury.

The appellant further requested the following instruction:

"I instruct that before the respondents, Herman Smithgall and wife, would have the right to place a dam across the waters of the Tilton River, back up or divert the waters of said river, they would have to obtain the consent of the lower riparian proprietors or acquire their rights by purchase, as it is the law in this state that the owner of land on the bank of a stream has a natural right to the use of the waters which flow in the stream adjacent to his land as it is wont to run without diminution or alteration;"

and its refusal is assigned as error. Under the common law and the law of this state every riparian owner has a right to have the waters of a natural water course flow through his land in their accustomed channel, without unnecessary diminution or pollution by an upper riparian owner, and it seems to us that a riparian owner may not impound all the waters flowing in a stream for 14 hours out of every 24, without the consent of a lower riparian owner, or a condemnation of his rights. The lower riparian owner may require the use of the water at all times during the 24 hours of the day for some lawful purpose, and, if so, a use such as is asserted here by the respondents would be an unlawful interference with his rights. The instruction requested, or one of similar import, should have been given.

Other errors are assigned as to the amount of the recovery, but in view of a retrial of the action we do not deem it necessary to discuss them. For the errors above indicated, the judgment is reversed and a new trial ordered.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8844. Department Two. May 24, 1910.]

THOS. A. NOON *et al.*, *Appellants*, v. J. C. MIRONSKI, *Respondent*.[1]

LANDLORD AND TENANT—LEASE—USE OF PREMISES—RESTRICTIONS. The statement in a lease of a storeroom that it was "for the purposes of conducting a bakery therein," is not a restriction which would prevent its use and occupation for the purpose of selling groceries; since the building was adapted thereto, and the use was not materially different from the bakery business.

EVIDENCE—TO VARY WRITING—AMBIGUITY—LEASE. A lease of premises "for the purpose of conducting a bakery therein" is not ambiguous so as to permit oral evidence to explain that the clause was intended as a restriction preventing the use of the premises for any other purposes.

COSTS—WITNESS FEES—WIFE OF PARTY. Upon judgment for the defendant, costs may be taxed for the witness fees of his wife, although she was a competent party defendant and might have been joined as such.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 18, 1910, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action of forcible entry and detainer. Affirmed.

Byers & Byers, for appellants.

Elias A. Wright, for respondent.

DUNBAR, J.—The appellants leased a storeroom in the city of Seattle to the respondent for the purpose of conducting a bakery. The respondent conducted a bakery for some time, and finally began to sell some groceries in connection with the bakery; at least, this is the allegation of the complaint, and for the purposes of this case we may assume it to be true. The respondent was notified to quit keeping groceries for sale, and there was some discussion backwards and for-

[1]Reported in 108 Pac. 1069.

wards between them on the subject. The appellants gave him notice to vacate the premises and, upon his failure to do so, brought suit of forcible entry and detainer, and upon the failure of the respondent to file a bond, he was evicted, and possession of the premises given to appellants. The respondent then filed his amended answer, in which he denied keeping groceries, excepting with the assent of the appellants. A reply was interposed, and the case went to trial. Appellants introduced their evidence in chief and respondent introduced his evidence, and evidence was introduced in rebuttal; when the respondent interposed a motion for an instructed verdict on two grounds: (1) that the attempted restriction in the lease for bakery purposes was not exclusive, and that the respondent was entitled to conduct any lawful business in the storeroom. The second ground for the motion was not considered by the lower court, and will not be here. This motion was by the court granted, and the jury instructed to return a verdict for the respondent. Thereafter the respondent filed a cost bill in which, among other items, he taxed a witness fee for Pauline Mironski, wife of respondent. Appellants filed their motion to strike from the cost bill the item taxed as a fee for the wife of respondent, and this motion was by the court denied. The errors assigned are the refusal of the court to deny the motion in regard to the costs, and in sustaining the motion for an instructed verdict.

That portion of the lease upon which the appellants base their claim is as follows:

"That the lessor, in consideration of the covenants of said lessee hereinafter set forth, does by these presents lease and demise unto the said lessee the following described property: . . . for the purposes of conducting a bakery therein."

This is all that is said in regard to the restriction. There is in every lease, in the absence of express covenants to the contrary, an implied obligation on the part of the lessee to use the property lawfully and for lawful purposes, and to so use it as not unnecessarily to injure it, or to unnecessarily

injure the inheritance. But in the absence of special restrictions in the lease, the rule does not extend further. The general rule is announced in 18 Am. & Eng. Ency. Law (2d ed.), at page 684, as follows:

"During the existence of the lease a lessee is for all general purposes the owner of the demised premises, and may, in the absence of restrictions in the lease, put the premises to such use or employment as he pleases, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed, but of course he must not use the premises in such a manner as to constitute waste, nor create a nuisance to the injury of the lessor with respect to adjoining property. The tenant has no right to introduce into the premises disreputable or disorderly characters, such as would tend to convert an ordinarily respectable tenement into a bawdy house or one frequented by disorderly characters, and such use of the premises may be enjoined as not within the contemplation of the parties at the time of making the lease. . . ."

Under this rule, which is established by universal authority, it is plain that the restriction expressed in the deed would not prevent the use and occupation of this room for the purpose of selling groceries; for the grocery business is not so materially different from the bakery business that it would in any manner tend to injure the premises leased or bring it into disrepute in any possible manner; and being a storeroom, it would fall squarely within the rule that it might be employed for any lawful purpose and for the purposes for which the room was constructed.

It is, however, contended by the appellants that the court erred in taking the case from the jury; that when the language of the contract is indefinite or ambiguous, it is the duty of the court to adopt the construction and practical interpretation which the parties themselves have placed upon the contract, and to enforce that construction where the language of the contract is ambiguous, and that evidence must necessarily be received to explain the ambiguity. But on

this proposition we have to say that this contract, in our opinion, is not ambiguous. All that the lessee agreed to do was to pay the stipulated rent in the manner stipulated; that he would keep the interior of the premises in good repair at his own expense, and return peaceable possession of the same at the expiration of the lease, to pay certain charges for gas, etc., and to keep the premises in a clean and wholesome condition in accordance with the requirements of the law and the ordinances of the city. All that he agreed not to do was to make alterations to the premises without the written consent of the lessor. So that the matter complained of was not included within the restrictions imposed upon the lessee and, there being no other restrictions expressed in the lease, it will be presumed that they were all the restrictions within the minds of the contracting parties. If the contract by its conditions and legal effect invests a party with a right, it is the same as if the right had been expressly stipulated in the instrument.

As to the proposition that the court erred in allowing witness fees to the respondent's wife, the appellants insist that, while probably not a necessary party to the action, she was at least a competent party defendant, and therefore ought not to be entitled to fees as a witness. But if she was a competent party, it was within the power of the appellants to have made her a party to the suit and, not having done so, they cannot now complain that the respondent, even though her husband saw fit to subpoena her as a witness in the case, and being so subpoenaed as a competent witness, there would seem to be no reason why she should not be entitled to her fees the same as any other witness.

No error appearing, the judgment will be affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8729. Department Two. May 26, 1910.]

HARRY RYNO, *Appellant*, v. ANTOINE SNIDER *et al.*, *Respondents*.[1]

LIMITATION OF ACTIONS—SUSPENSION—REVERSAL OF JUDGMENT—NEW SUIT. Rem. & Bal. Code, § 173, providing that, if judgment for plaintiff be reversed on appeal in an action commenced within time, the plaintiff may commence a new action within one year after reversal, does not apply where no cause of action was stated or existed at the time the first action was commenced.

Appeal from a judgment of the superior court for King county, Clifford, J., entered October 18, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

A. C. MacDonald and *S. G. Murray*, for appellant, cited: *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Young v. Davis*, 30 Ala. 213; *Landdale v. Cox*, 30 Ky. 391.

Byers & Byers, for respondents.

DUNBAR, J.—An action in ejectment was brought by the appellant against the respondents, the complaint alleging, among other things, that the defendants claimed title to the said real estate by reason of a tax title, which said tax title was void and worthless; that plaintiff's grantor had paid to the county treasurer of King county, Washington, the officer entitled by law to receive the same, the full amount of the taxes, interest, and costs due to said defendants by reason of the said tax title, and which are a lien on the said property. A demurrer to the complaint having been overruled and the case tried, judgment was entered in favor of the plaintiff, from which the defendant appealed to this court, and a decision was rendered which is reported in *Ryno v. Snider*, 49

[1]Reported in 109 Pac. 55.

Wash. 421, 95 Pac. 644, which said opinion is referred to as furnishing a complete statement of the case. On said appeal the judgment of the lower court was reversed, and it was held that no cause of action existed, for the special reason that there was no allegation in the complaint that the taxes due and paid by the appellant in that case, the respondent in this, had been tendered to appellant, and no evidence showing or tending to show that any such payment had been made or tendered to the appellant or his predecessor in interest.

Afterwards and subsequent to the time when the statute of limitations had run against the commencement of the action now under consideration, this action was commenced, and practically the same relief is asked for. Findings of fact were made which are not questioned by the appellant, conclusions of law and judgment followed in favor of the respondents, and from such judgment this appeal is taken.

There is but one question presented, viz., is this action barred by the statute of limitations, or can appellant avail himself of the provisions of § 173, Rem. & Bal. Code, which reads as follows:

"If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after reversal."

It is admitted that, in the case at bar, this was done, respondents, however, contending that appellant's complaint in the former suit did not state a cause of action, and therefore did not stop the running of the statute of limitations; while it is the contention of the appellant that the statute is broad in is terms and embraces any action that may be commenced within the time prescribed, where the judgment of the plaintiff has been reversed on appeal or error. There seem to be but very few litigated cases on this question, but we are inclined to the view that the statute is intended to apply to the actions where there was a cause of action stated

but improperly pleaded, or where a cause of action was stated but the action had been prematurely brought, or cases of that kind, and not a case where the judgment had been reversed because no cause of action had been stated, or where no cause of action existed at the time the action was commenced. And it appears from the pleadings and the evidence in the first case of *Ryno v. Snider*, reported by this court and cited above, that no cause of action existed at the time of the trial of that action.

The appellant relies somewhat on the case of *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22, where it is held, in an action to foreclose a lien for materials furnished for a building, and the judgment was reversed and the plaintiff commenced his second action in less than one year after his failure in the first action, though not within the time prescribed by the statute for the commencing of the action in the first place, that by virtue of the provisions of § 23 of the civil code of Kansas, which is practically the same as § 173 of Rem. & Bal. Code, the action is not barred by the limitation prescribed for the commencement of the first action. But that case, when examined carefully, we think does not sustain appellant's contention, for the reason that the reversal of the judgment in the first case was because the action had been prematurely brought, it having been brought within less than sixty days after the completion of the building, which, under the statutes of Kansas, was too soon. There was no question there that the cause of action did not exist, and it was preeminently a proper case for the application of the remedial statute. That it was not the intention of the supreme court of Kansas to apply the doctrine there applied to a case of this kind is shown by a subsequent case, viz., *McGlinchy v. Bowles*, 68 Kan. 190, 75 Pac. 123, where *Seaton v. Hixon, supra*, was distinguished, and where it was held that the rule there announced would not apply to a case where no cause of action had been stated or existed at the time the first action was brought; and by *Railway Co.*

v. Bagley, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259, where it was held that, where the original petition states no cause of action whatever, it will not arrest the running of the statute of limitations. We are unable to find any adjudicated cases to the contrary.

We take pleasure in incorporating the brief and concise opinion rendered by the trial court in this case, and in indorsing the same as a proper exposition of the law. The court said:

"A careful consideration of this case has brought me to the conclusion that the action is barred by the three years' statute of limitations. Laws of 1907, page 398. Had the former action *Ryno v. Snider*, 49 Wash. 421, 95 Pac. 644, never been begun it is clear the present suit would be barred. I am of the opinion that *Ryno v. Snider* did not stop the running of the statute. Where a case is reversed by the supreme court and sent back because of error in the pleading or at the trial, if a cause of action actually exists, a new action may be commenced within one year after the reversal. Pierce's Code, § 297. But if something remains to be done before a cause of action exists, and that thing is not done until the statute has run, the new suit is barred on a new cause of action, one of the essential elements of which did not exist when the former action was begun, nor until it had been decided in the supreme court, and the bar of the statute was complete. The tender of taxes after the time had run could not remove the bar of the statute. The opinion of the court in *Ryno v. Snider* shows that the case was reversed and the case ordered dismissed in the lower court, not merely because a sufficient tender had not been pleaded, but because no tender had been made and no cause of action existed. The judgment is for the defendant that his title to the land in question be quieted."

No error appearing in the record, and the court, in our judgment, having taken the proper view of the law, the judgment is affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8762. Department Two. May 26, 1910.]

CALDWELL BROS. & COMPANY, *Respondent*, v. COAST COAL COMPANY, *Appellant*.[1]

SALES—CONTRACT—ACCEPTANCE—EVIDENCE—SUFFICIENCY. An offer to sell and deliver one article f. o. b. at S. and another article f. o. b. at T., will be considered as unqualifiedly accepted by an acceptance of both articles to be delivered f. o. b. at T., where there was evidence of an oral acceptance of the proposal, both parties acted upon the contract as consummated, and the purchaser received and paid for part and claimed damages as to the balance.

SALES—PERFORMANCE—PARTIAL PAYMENTS—EFFECT—SETTLEMENT. Upon a sale of two articles for a lump sum, and the refusal of the vendee to accept one of them because of alleged insufficiency, the vendor's acceptance of a sum of money in payment for one of the articles, as a full settlement of that portion of the contract, does not preclude him from recovering the balance of the contract price, nor limit the recovery to the reasonable value of the other article, if the contract was fully performed.

EVIDENCE—ADMISSIONS—DECLARATIONS OF AGENT—PRINCIPAL AND AGENT. The admission of an agent that his principal's contract had not been performed and would not be enforced, made after the transaction and after the controversy arose, is not competent as an admission against interest, being only an expression of an agent's opinion upon past rights and obligations.

SALES—CONTRACT—WARRANTY. A contract to manufacture and sell "one 400-ton Howe coal washer," according to plans and specifications, which designated it as a Howe coal washer, "Capacity 400-tons per day," and which plans were prepared and agreed upon in detail, is not a guarantee that it is capable of washing 400 tons of coal a day, and is not breached by want of such capacity where it was made according to the specifications.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 27, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 108 Pac. 1075.

F. S. Blattner and *L. D. da Ponte*, for appellant.

Shank & Smith, for respondent.

PARKER, J.—This action was commenced to recover the sum of $3,070, the contract price of a coal washer and a coal bunker. A trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiff for the sum of $1,071, from which the defendant has appealed. The facts admitted by the pleadings and found by the trial court are, in substance, as follows:

The contract sued upon is evidenced by certain letters of proposal and acceptance thereof as follows:

"Coast Coal Co., October 30th, 1907.
"Tacoma, Wash.

"Gentlemen:—Complying with the request of Messrs. Dorr and Coffin, we are pleased to quote you on, and furnish specifications and drawing for one 400-ton coal bunker and washer. You will note that the specifications call for both flight and bucket elevators. This matter will be left to your option. We might also add that this equipment has been figured as nearly complete as has been possible, but, owing to the fact that it will be hard to determine the exact speed necessary for your washer to run until the nature of the work to be performed has been determined, we have left out two pulleys and the length of belt necessary to drive washer. The price of this equipment f. o. b. Tacoma is $3,435.00. We trust that you will favor us with this order, and we assure you that the same will receive our careful and prompt attention.

"Very truly yours,
"The Caldwell Brothers Co.
"By F. M. Caldwell."

"Coast Coal Co., Nov. 1, 1907.
"Tacoma, Wash.

"Gentlemen:—We beg to submit you, in addition to our proposition submitted to you on October 30, the following:

"We to furnish you all material named in our specifications accompanying our above named letter with the exception of the Jeffries-Howe washer, they to be supplemented by a locally built washer of the Howe type and furnished

with a No. 3 Gardner Duplex Regular fitted pump for $3,070.00. All the material with the exception of the washer f. o. b. our store Tacoma. The washer to be f. o. b. Seattle. We trust that either one or the other of these propositions will meet your approval, and that you will favor us with your order which will receive our careful and prompt attention.

Yours truly,
"The Caldwell Bros. Co."

"Caldwell Bros. Co., Tacoma, Washington, Nov. 5, 1907.
"Tacoma, Washington.

"Gentlemen:—We accept your proposition of November 1st, to furnish us with one 400-ton Howe coal washer and coal bunker, according to specifications and blue print, furnished f. o. b. Tacoma, $3,070. Terms upon same, $1,000.00 upon receipt of shipping receipts, $1,000.00 thirty days and $1,070 sixty days from date of shipping receipt.

"Coast Coal Company,
"Very truly yours,
"By Joseph K. Dorr, Secretary."

The respondent performed its part of the contract by manufacturing the coal bunker and delivered it to appellant, and by manufacturing the coal washer and tendering it to appellant. Prior to the trial, appellant paid to respondent $1,999 upon the contract price, leaving unpaid a balance of $1,071. By agreement between the parties the bunker was to be considered as fully paid for. The washer having been tendered to and refused by appellant, respondent holds it for appellant and to secure the balance due upon the contract price. We will note other facts as may be necessary in our discussion of the errors assigned.

It is first contended by learned counsel for appellant that the contract evidenced by the letters and acceptance is not complete, in that the offer of respondent was to deliver the washer f. o. b. at Seattle and to deliver the bunker f. o. b. at Tacoma, while the acceptance was for delivery of both at Tacoma and was, therefore, not an unqualified acceptance of the offer. There might be some merit in this contention if the acceptance depended entirely upon the writings above

quoted. But there was evidence tending to show that, in addition to the written acceptance, the appellant orally accepted the proposal of respondent, and in addition, both parties have treated and acted upon the contract as consummated; the respondent by manufacturing and tendering the machinery, and the appellant by accepting a part of it and paying a substantial part of the contract price. The appellant has, also, by its cross-complaint, sought to recover damages for an alleged breach of the contract on the part of the respondent. We think it clear that the contract must be regarded as having been entered into even though there may originally have been some uncertainty as to the place of delivery.

Several contentions are made in behalf of appellant based upon the theory that the balance due respondent, if any, is dependent upon the reasonable value of the washer; the trial court having excluded evidence of, and refused to consider, its reasonable value. It is argued that, since the original contract was for a lump sum as the price for both the washer and bunker, upon settlement of a part of the controversy appellant became liable in any event only for the reasonable value of the remainder, to wit, the washer. There is nothing in the record indicating that by this understanding between the parties, eliminating from the controversy all matters except the washer and the unpaid balance of the contract price, they thereby intended that these matters should be determined other than by the terms of the contract. If respondent has performed its part of the contract in the manufacture and tender of the washer, it is entitled to the whole of the balance of the contract price. The fact that the parties agreed that the contract, in so far as the delivery of the bunker and the payment of the $1,999 is concerned, should be regarded as a settlement of that portion of the contract, does not show that the balance due, if any, is to be determined by the reasonable value of the washer. We think that the reasonable value of the washer was in no way involved,

and that the court properly excluded such question from consideration in determining the rights of the parties. The question was still one of contract price, and not of reasonable value.

During the trial counsel for appellant offered to prove by the testimony of Mr. Spike, the appellant's manager, that in a conversation with him some time after the completion and tender of the washer and after this controversy arose, Mr. Mather, the respondent's manager, had stated:

"That the coal washer which had been built was not in accordance with the contract or the specifications which had been entered into between plaintiff and defendant, and for that reason the defendant took and paid for the other articles which are mentioned in this contract, and that Caldwell Bros. Co. would not require defendant to receive or take the washer."

Objection by counsel for respondent to this offer was sustained, and the ruling thereon is here claimed as error. It is plain from the record that the defense was not made upon the theory that the parties had agreed to a full settlement of the controversy by the delivery of the bunker and payment of $1,999 upon the contract price. So this evidence is only material, if at all, as an admission tending to show that the respondent had not complied with the contract in the manufacture of the washer. This is the theory upon which counsel for appellant contends that the evidence was admissible. He argues that it was an admission against the interest of respondent made by its agent, and hence, binding upon it. It seems to us that this is nothing more than an attempt to prove statements of an agent amounting only to an expression of an opinion as to the rights and obligations of his principal after the transaction out of which such rights and obligations arose, and also after such rights and obligations had become a subject of controversy.

In 16 Cyc. 1008 it is stated:

"It is to be observed that in the law of agency it is no part

of an agent's duty to prejudice his principal by narrative statements construing or otherwise affecting his principal's rights or liabilities, or to discuss the propriety of his conduct even in relation to the subject-matter of the agency. On these grounds, rather than that of irrelevancy, rests the broad general rule that an agent's narrative of a past transaction does not affect the principal."

See, also, *Weideman v. Tacoma R. & Motor Co.*, 7 Wash. 517, 35 Pac. 414. We are of the opinion that the statements of Mather, sought to be proven, were not admissible as admissions against respondent.

It is contended by appellant that the proof shows that the washer was not a 400-ton washer, and therefore not according to the contract. This contention is based upon the assumption that the contract amounted to a guaranty that the washer was capable of washing 400 tons of coal per day, that the evidence shows that it would not wash that amount per day, and that the court should have so found; while respondent contends that the evidence would in no event warrant such a finding, and also that the contract did not amount to a guaranty as to the capacity of the washer. It will be noticed that there are no specific words of guaranty in the contract, and the contention that there was a guaranty of the nature claimed rests wholly upon the language of the contract designating or naming the washer. In the first letter of proposal it was designated as, "One 400-ton coal bunker and washer." In the second letter of proposal it was designated as, "A locally built washer of the Howe type." In the order it was designated as, "One 400-ton Howe type coal washer." In the letter of acceptance it is designated as, "One 400-ton Howe coal washer." In the specifications it is designated as, "One standard vertical type Howe coal washer, capacity 400-tons per day." According to the terms of the contract the washer was to be constructed according to specifications and blue print furnished. These, it appears from the record, provide in detail the manner of its con-

struction and its size. The specifications and blue print were prepared and agreed upon by the parties before, and at the time of, entering into the contract, and no contention is made by appellant that the washer was not constructed in strict compliance therewith. Under such circumstances we think the court was fully justified in declining to hold that there was a warranty or a breach thereof as to the capacity of the washer.

When the parties to a contract designate the article to be manufactured in the manner here involved, and then proceed to agree upon detailed specifications and drawings as to the size and manner of construction of such article, we think the contract itself shows that the manner of so designating the article was nothing more than the use of a trade name or term for it, and the question of whether or not it is constructed in compliance with the terms of the contract is to be determined by the detailed specifications and drawings, and not by the mere name they may choose to call it, or the manner by which they may designate it, and that such designation does not amount to a warranty as to its capabilities. 30 Am. & Eng. Ency. Law (2d ed.), 148; *Kleeb v. Bard*, 7 Wash. 41, 34 Pac. 138; *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53; *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510; 17 Am. & Eng. Ency. Law (2d ed.), 12.

We are of the opinion that the learned trial court correctly determined the rights of the parties, and its judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8870. Department Two. May 26, 1910.]

WALLACE A. BUSSELL, *Petitioner*, v. HIRAM C. GILL, *as Mayor of Seattle, Respondent.*[1]

MUNICIPAL CORPORATIONS—SPECIAL CHARTERS—LOCAL SELF-GOVERNMENT—PUBLIC PLANS COMMISSION—VALIDITY—MEMBERSHIP. The amendment to the city charter of Seattle creating a municipal plans commission, does not violate Const., art. 11, § 10, guaranteeing local self-government, in that part of the members of the commission are to be appointed by associations, clubs, and public service corporations some of which are nonresidents of the state and of the United States; since the commissioners are all required to be citizens of the city, and are appointive, not elective, officers, with only advisory powers, whose plans are to be submitted to a vote of the people, and no legislative authority is delegated to it.

SAME—APPROVAL OF VOUCHERS—TAX. Such amendment is not objectionable by reason of conferring authority upon the commission to approve vouchers for all expenditures incurred, and requiring the comptroller to issue warrants to be paid out of the municipal plans commission fund, raised by a tax levy therefor.

SAME—SPECIAL PRIVILEGES—CONSTITUTIONAL LAW. Such amendment does not violate Const., art. 1, § 12, providing that no law shall grant special privileges to any citizen or class of citizens, in that certain designated associations and corporations are granted the privilege of participating in the selection of the commission; since the right simply of recommendation is not such a right or privilege as comes within the prohibition of the constitution.

Certiorari to review a judgment of the superior court for King county, Frater, J., entered May 3, 1910, dismissing an action for an injunction, after sustaining a demurrer to the complaint. Affirmed.

Milo A. Root, for petitioner, contended, *inter alia*, that a taxpayer may maintain this action. *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865; *Mazet v. Pittsburg*, 137 Pa. St. 548, 20 Atl. 693; *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *Crampton v. Zabriskie*, 101 U. S. 601; *Krieschel v. Board of Com'rs*, 12 Wash. 428, 41 Pac.

[1]Reported in 108 Pac. 1080.

186. The amendment permits nonresidents of the city, state and nation to have a voice in the selection of city officers of Seattle, and is void as destructive of the principle of local self-government. 28 Cyc. 121; 20 Am. & Eng. Ency. Law (2d ed.), p. 1042, 1142, 1217; Cooley, Const. Lim. (6th ed.), 248; Dillon, Mun. Corp. (4th ed.), 96, 357; Horr & B. Mun. Ordinances, 10, 11; McQuillan, Municipal Ordinances, 128; *Blair v. City of Wasco*, 75 Fed. 800, and cases cited; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Gulf etc. R. Co. v. Riordon* (Tex. Civ. App.), 22 S. W. 519; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105, and note thereto. A city cannot surrender nor delegate its powers to others in whole or in part. 4 Supplement Am. & Eng. Ency. Law (2d ed.), p. 95, note 8; *Gossler v. Georgetown*, 6 Wheat. 593; *Valparaiso v. Gardner*, 97 Ind. 1; *Attorney General v. Lowell*, 67 N. H. 198, 38 Atl. 270; *Carlyle Water, L. & P. Co. v. Carlyle*, 31 Ill. App. 325; *Vandalia R. Co. v. State ex rel. South Bend*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. 370; *Montgomery v. Capital City Water Co.*, 92 Ala. 361; *State ex rel. McClellan v. Graves*, 19 Md. 351; *Gale v. Kalamazoo*, 23 Mich. 344; *Mayor etc. of Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702, 709; *Mayor etc. of New York v. Second Avenue R. Co.*, 32 N. Y. 261; *Waterbury & Co. v. Laredo*, 68 Tex. 565; *National Water Works Co. v. City of Kansas*, 20 Mo. App. 237-242. The amendment vests the commission with legislative functions. *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064; *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 96 Pac. 1033. The power to make contracts and perform other municipal business resides with the city council unless expressly lodged elsewhere. 28 Cyc. 316, 636, 643; Cooley, Const. Lim., chapter 8; *Blair v. City of Wasco*, 75 Fed. 800, and cases cited; *Semmes v. Mayor etc. of Columbus*, 19 Ga. 471; *Mayor etc. of Baltimore v. Poultney & Trimble*,

25 Md. 18; *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106; *State ex rel. Jordan v. Haynes*, 72 Mo. 377; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Moore v. Mayor etc. of New York*, 73 N. Y. 238, 29 Am. Rep. 134; *Dey v. Mayor etc. of Jersey City*, 19 N. J. Eq. 412; *Richards v. Clarksburg*, 30 W. Va. 491. The amendment is a plain abridgment of the right guaranteed to a voter by the state constitution. Const., art. 6, §§ 1, 6; Cooley, Const. Lim. (6th ed.), 756, 758, 775.

Scott Calhoun, Stephen V. Carey, Kerr & McCord, and *Walker & Munn*, for respondent.

Crow, J.—This is an original proceeding, instituted in this court by petition, for a writ of certiorari to review the final judgment of the superior court of King county, entered in an action commenced by Wallace Adam Bussell, against Hiram C. Gill, as mayor of the city of Seattle, to enjoin him from appointing members of the Municipal Plans Commission. The trial court sustained a demurrer to the complaint, and the cause was dismissed.

The complaint attacks the validity of article 25, an amendment to the city charter, adopted March 8, 1910, creating a Municipal Plans Commission, which article, omitting immaterial sections, reads as follows:

"Section 1. That there be and hereby is created a commission to be known as a Municipal Plans Commission, which shall consist of twenty-one members. It shall be the duty of said commission to procure plans for the arrangement of the city with a view to such expansion as may meet probable future demands. These plans shall take into consideration the extension of the city and city works into adjacent territory; improvement and changes in public utilities and lines of transportation by surface, underground and water; the location, widths and grades of arterial highways necessary for the best treatment of the city, the development of the water front with its sea wall and wharves, the location of public buildings municipal decorations, and such further extensions of and additions to the park and boulevard system

of the city as it may, in conjunction with the Park Board, find advisable.

"Section 2. The members of such commission shall be citizens of the city of Seattle and shall be chosen in the following manner, to wit: Three shall be elected from the city council by its members; one shall be elected from the Board of Public Works by its members; in the same way one member shall be elected from the King county commissioners; one from the Seattle Board of Education and one from the Seattle Park Commission. The other members shall be appointed by the mayor in the following manner, to wit: Each organization hereinafter named shall nominate two of its members and the mayor shall appoint one of the two so nominated. The interests representing the water front owners, steam railway companies, street railway companies, and marine transportation companies shall organize, respectively, by mass meetings, at which a chairman and secretary shall be elected, and such official shall certify to the mayor the two names elected at such meetings. The call for such meetings shall be given publicity in the press of the city.

The Pacific Northwest Society of Civil Engineers.

The Washington State Chapter of American Institute of Architects.

The Seattle Chamber of Commerce.

The Seattle Commercial Club.

The Manufacturers' Association.

The Central Labor Council.

The Seattle Clearing House Association.

The Seattle Bar Association.

The Seattle Real Estate Association.

The Carpenters' Union.

The Water Front Owners.

The Steam Railway Companies.

The Marine Transportation Companies.

The Street Railway Companies.

In case of failure of any of said organizations or interests to nominate, then these members are to be appointed by the mayor, and each shall be chosen for his known qualifications with respect to the interests which shall have failed to certify its nominations.

"Section 7. There shall be furnished to said commission suitable quarters for the carrying on of its investigations, together with such engineering and clerical assistance as

may be necessary, and the commission shall, as soon as practicable after its organization, employ one or more, but in no case to exceed three, men of national reputation recognized as authorities in city planning to prepare a comprehensive plan under its direction and subject to its approval and adoption, embracing in its scope the entire area of the city, and such contiguous territory, as is comprehended in section one (1) of this resolution. The final plans shall be submitted to the commission for approval, and shall be regarded as approved, unless rejected by a two-thirds vote of said commissioners within thirty (30) days after the same shall have been filed with the commission. The Municipal Plans Commission shall hold regular meetings; at least one such meeting every two weeks. Upon the conclusion of the sittings of said commission, it shall submit its findings in full to the mayor and the city council of Seattle in printed form, together with plans. Said report shall be presented to the mayor and city council not later than September 30, 1911, and they shall cause the recommendations of the commission to be submitted to the people at the next general or special city election.

"Section 8. That if a majority of the voters voting thereon shall favor the adoption of said city plan so reported, it shall be adopted and shall be the plan to be followed by all city officials in the growth, evolution and development of said city of Seattle, until modified, or amended at some subsequent election.

"Section 9. There is hereby created a fund to be known as Municipal Plans Commission Fund, which shall consist of a tax levy to be made during the year 1910 as other taxes are levied, of one-fourth (1/4) of a mill on the dollar, but no other or further levy or payment into said fund shall ever be made. The Municipal Plans Commission shall have exclusive power to pay out moneys from such fund for any and all purposes specified in section one (1) hereof, and shall, on or before the 10th day of August of the year 1910, prepare and submit to the city council for approval and adoption, an estimate of the amount of money which may be required for its purposes, in conformity with chapter 138 of the Laws of the State of Washington, Session 1909.

"Section 10. All expenditures on account of work done shall be made upon vouchers approved by a majority vote of

the Municipal Plans Commission and signed by its president and secretary. Each voucher shall, when accompanied by a detailed statement of such expenditures, be certified to the city comptroller, who shall issue a warrant therefor to the city treasurer, and the same shall be paid by the treasurer out of any money in the Municipal Plans Commission Fund not otherwise appropriated. Said commission may anticipate the revenues to be paid into said fund under the tax levy herein provided for by the issuance of its warrants against said fund to provide money for the necessary expenses of said commission prior to the availability of the funds to be raised by such levy. No expense against such fund shall be incurred after September 30, 1911, nor in excess of the levy provided, and any surplus remaining in said fund after said date, not lawfully appropriated or obligated for, shall be by ordinance transferred into the general fund."

Fourteen different organizations mentioned in the charter amendment are each authorized to nominate two persons as eligibles for appointment on the commission. The complaint alleged that the membership of these several organizations includes persons who are nonresidents of the state of Washington and of the United States, and the appellant now contends that, as the charter amendment in effect permits nonresidents to participate in the municipal affairs of the city of Seattle, by exercising the high privilege of choosing persons to be selected as public officers, it is necessarily void. The constitution of this state, art. 11, section 10, provides that:

"Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state."

The object of this constitutional provision was to secure to all such cities complete local self-government in municipal affairs, subject only to the restrictions mentioned, and charter provisions adopted under the authority so conferred should not be held invalid, unless it appears that they are in direct conflict with the constitution or laws of the state.

In *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, this court said:

"Both the constitution and the general law recognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise, and it is only when some act in the execution of that policy conflicts with the general law or contravenes the constitution, that the act can be questioned."

The city of Seattle framed its charter, and the amendment now under consideration was adopted, by proper procedure and vote. It expressly directs that all members of the Municipal Plans Commission shall be citizens of the city. It is therefore apparent that the various organizations mentioned cannot, if they would, by any nominations they may make, impose upon the mayor the duty or necessity of appointing nonresidents. Although nonresident members of the several organizations may have a voice in nominating two candidates as eligibles for appointment, we fail to see how, in the absence of an express constitutional inhibition, that fact invalidates the charter amendment. The commissioners thus selected will be appointive, not elective officers. No resident of Seattle is deprived of any of his rights as a citizen or elector. The people by their own vote have authorized this method of selection. The commissioners will be legally appointed officers, irrespective of the incidental fact that the number of eligible persons from whom the mayor may appoint them is restricted by the charter amendment. The commission will employ men of national reputation to prepare and submit final plans. It cannot originate plans. It can only reject those suggested by a two-thirds vote. The commission itself originated with the people, who adopted the charter amendment, and will cease to exist after September 30, 1911, no provision being made for its continuance. Plans for improvements and works can only be adopted by a vote of the people. No legislative power is delegated to the commission in violation of the constitution or any general

law. The evident purpose of the amendment is to secure experienced, capable and representative citizens to serve upon the commission and select men of national reputation to prepare and submit comprehensive plans. The commissioners from the various organizations must be appointed by the mayor. The commission will be an advisory body only. Proposed plans are subject to a final vote of the people. It is therefore manifest that the authority conferred originates with the people, and that the plans prepared and suggested can only be validated or adopted by them. They have reserved a supervisory control in themselves, and are deprived of no constitutional right. It is no concern of ours whether the amendment has provided the best or wisest method for selecting the commission. It was adopted by the people under the authority of the constitution. The commissioners are not vested with legislative powers. They will make no levies of taxes, and the advisory functions which they are to perform do not conflict with any restrictions of the constitution or laws of the state. *Miller v. Louisville*, 30 Ky. Law 664, 99 S. W. 284.

Appellant further insists that the amendment is void because it confers authority upon the commissioners to approve vouchers for all expenditures incurred, and requires the comptroller to issue warrants upon the city treasury for the amount of such vouchers to be paid out of the Municipal Plans Commission fund. He insists that nonresidents, by nominating eligibles for appointment, will have a voice in the expenditure of the money raised by the tax authorized. We find no merit in this contention. The Municipal Plans Commission will be composed of residents of the city. Authority to approve vouchers for expenditures is lawfully conferred upon it. In *State ex rel. Lowman & Hanford etc. Printing Co. v. Riplinger*, 30 Wash. 281, 70 Pac. 748, this court sustained a similar charter provision, which compelled the comptroller of the city of Seattle to issue warrants upon the city treasurer solely upon the certification of the library

board without any action of the city council. The rule there announced is controlling here.

Section 12, art. 1, of the state constitution, provides that:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Appellant insists that the amendment under discussion violates this section, as it grants a privilege to each of the fourteen organizations mentioned, and to their members, which is not granted to the members of other similar organizations, such privilege being the right to participate in the selection of members of the commission. This contention cannot be sustained. In *State v. Vance*, 29 Wash. 435, 458, 70 Pac. 34, a similar attack was made upon the jury law of 1901, which authorized the bar of the county to nominate four electors, two of whom were to be appointed as jury commissioners by the superior court; but the validity of the act was sustained. While it is true that some argument was predicated upon the fact that the members of the bar are officers of the court, that argument was not necessary to the conclusion reached. Discussing the term "privileges and immunities," this court said:

"These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Constitutional Limitations (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the Federal constitution. The right simply of recommendation, which it might be said has been conferred by the act under consideration, and by the order of the court

made in accordance with the provisions of that act, is not, in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law."

The demurrer to the complaint was properly sustained. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8548. Department One. May 27, 1910.]

FRANK P. O'BRIEN, *Appellant*, v. AMERICAN CASUALTY COMPANY *et al.*, *Respondents*.[1]

TRIAL—VERDICTS—JUDGMENT—CONFORMITY TO VERDICT—HOSPITAL ASSOCIATIONS—MALPRACTICE. In an action for malpractice against a physician, and a hospital association and its successor by whom he was employed at different periods of plaintiff's treatment, a verdict against the hospital association separately for $2,000, against its successor for $4,000, and against the physician individually for $1,000, does not authorize a joint and several judgment against all the defendants for $7,000, nor against the physician for said sum, nor a joint judgment against any two of them, when read in the light of the court's instructions to the jury that they might bring in separate verdicts against the hospital association and its successors for negligence other than that of the physician, and against the physician individually for negligence while not acting as agent; nor a joint verdict against the hospital association and the physician for his negligence during one period of the treatment while the physician was in its employ, a joint verdict against the successor and the physician for another period while in its employ, and a verdict against the physician individually while not in the employ of either.

TRIAL—VERDICTS—CONFLICTING FINDINGS—HOSPITAL ASSOCIATIONS—MALPRACTICE—JOINT AND SEVERAL LIABILITY. In an action for malpractice against a physician and a hospital association and its successor by whom he was employed at different periods of the plaintiff's treatment, in which the gravamen was the negligence and incompetence of the physician, the verdict is unsupported by the evi-

[1]Reported in 109 Pac. 52.

dence and conflicting and there was a substantial mistrial, requiring a new trial, where the court instructed the jury that they might bring in separate verdicts against the hospital association and its successors for negligence other than that of the physician, and against the physician individually for negligence while not acting as agent, or a joint verdict against the hospital association and the physician for his negligence during one period of the treatment while the physician was in its employ, a joint verdict against the successor and the physician for another period while in its employ, and a verdict against the physician individually while not in the employ of either, and under the instructions the jury returned a general verdict against one association separately for $2,000, against the other association separately for $4,000, and against the physician individually for $1,000, and also answered special interrogatories to the effect that the $2,000 damages assessed against the hospital association was due to the negligence of the physician acting as its servant, during the only period of the treatment that the physician could have been acting individually; and a judgment for $1,000 against all the defendants notwithstanding the verdict is error, since any permanent injury resulted from the negligence of the physician and the findings fail to fix the responsibility therefor upon either the association or its successor.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Chapman, J., entered July 12, 1909, for the sum of $1,000 damages for malpractice, upon special findings and the verdict of a jury rendered in favor of the plaintiff for $7,000, after a trial on the merits. Reversed.

H. R. Lea, for appellant.

F. S. Blattner and *L. B. da Ponte*, for respondents American Casualty Company *et al.*

William P. Reynolds and *Hayden & Langhorne*, for respondent Wheeler.

RUDKIN, C. J.—The defendant Lumberman's and Manufacturers' Hospital Association, hereinafter referred to as the Hospital Association, is a corporation organized under the laws of this state, and was, until succeeded by the defendant American Casualty Company, hereinafter referred to as the Casualty Company, engaged in the business of furnishing medical and surgical attendance and hospital ac-

commodations to the employees of manufacturing establishments, for a profit. The defendant Wheeler is a practicing physician and surgeon, and was in the employ of the Hospital Association between the 10th day of August, 1907, and the 11th day of November, 1907, when the Casualty Company succeeded to the ownership and management of the hospital theretofore conducted by the Hospital Association.

On the 10th day of August, 1907, the plaintiff, O'Brien, was in the employ of the Harding Lumber Company as a millwright. His employer collected from each of its employees the sum of $1 per month to cover hospital fees and expenses, and had a contract with the Hospital Association to care for its sick and injured employees, in consideration of the hospital fees thus collected, which were turned over to the Hospital Association. On the last mentioned date, the plaintiff fractured his leg, and was taken to the hospital conducted by the Hospital Association for treatment. He remained in the hospital from the date of his admission until the 9th day of March, 1908, a period of seven months lacking one day. From the 10th day of August to the 11th day of November, he was under the care of the Hospital Association and the defendant Wheeler. From the 11th day of November until the 10th day of December, he was in the hospital under care of the defendant Wheeler, but whether Wheeler was an agent, servant, or employee of either the Hospital Association or the Casualty Company during that period, is a disputed question. From the 10th day of December until the date of his discharge he was under the care of the Casualty Company and one Dr. Keller, but no complaint is made of his treatment during this period. This action was instituted against the Hospital Association, the Casualty Company, and Dr. Wheeler, to recover damages for malpractice, neglect, and inattention on the part of the several defendants, between the 10th day of August and the 10th day of December. While other acts of negligence may be charged or proved, the principal charge of negligence was incompetency and in-

attention on the part of the defendant Wheeler. At the close of the testimony, the court gave the following instruction, among others:

"As you may find against the defendants severally under the issues in this case the court deems it proper to submit to you two forms of verdict. If you find negligence upon the part of the American Casualty Co. in its treatment of the plaintiff, other than through the acts of the defendant, Dr. Ernest C. Wheeler, you will insert the amount of compensation allowed for such negligence opposite the name, 'American Casualty Co.' And the same may be said by the court as respects the Lumberman's and Manufacturers' Hospital Association. If you find any negligence upon the part of Dr. Wheeler individually and not as agent or servant or employee of either of the other defendants, you will insert the amount allowed therefor opposite Dr. Wheeler's name. If you find against the American Casualty Co. by reason of the negligence of Dr. Wheeler as its agent, servant or employee, you may return a joint verdict against the American Casualty Co. and against D. Ernest C. Wheeler, inserting the amount therefor opposite the name, 'American Casualty Co. and Dr. Ernest C. Wheeler.' And if you find against the Lumberman's and Manufacturers' Hospital Association by reason of the negligence of Dr. Ernest C. Wheeler as its agent, employee or servant, you may return a joint verdict against the Lumberman's and Manufacturers' Hospital Association and Dr. Ernest C. Wheeler, inserting the amount found therefor opposite the name of the hospital association and Dr. Ernest C. Wheeler. So that in the first form of verdict, in case you find for the plaintiff, it will be in favor of the plaintiff against these defendants, as the case may be, under the instructions of the court. If you find in favor of the defendants, you will simply find in favor of the defendants."

Under the testimony and the charge of the court the jury returned the following verdict and special findings:

"We, the jury in the case of Frank P. O'Brien, Plaintiff, vs. American Casualty Company, a corporation; Lumberman's & Manufacturers' Hospital Association, a corporation; and Dr. Ernest C. Wheeler, Defendants, find for the plaintiff and against the following defendants and assess his damages in the sum of:

"American Casualty Co.....($2,000.00)
(Two Thousand no-100.)
"Lumberman's & Manufacturers' Hospital Association .....($4,000.00)
(Four Thousand no-100.)
"Ernest C. Wheeler.....($1,000.00)
(One Thousand no-100.)
"Lumberman's & Manufacturers' Hospital Association and Dr. Ernest C. Wheeler.....(.....)
"American Casualty Company and Dr. Ernest C. Wheeler .....(.....)"

Upon the request of the American Casualty Co. the jury made special findings as follows:

"Interrogatory No. I.—On what date did the American Casualty Co. acquire and take charge of the hospital known as the Tacoma Private Sanitorium? Ans. Took charge November 11, 1907.

"No. II.—Is it not true that after November 8, 1907, Dr. Wheeler continued to treat the plaintiff until December 9, under his employment by the defendant Lumberman's & Manufacturers' Hospital Association only? Ans. No.

"No. III.—On what date did Dr. W. M. Keller take charge of Frank P. O'Brien as his patient in the hospital? Ans. December 10, 1907.

"No. VI.—Was there any negligence on the part of the nurses or employees in the hospital who nursed Frank P. O'Brien after November 8, 1907? Ans. Yes.

"No. VII.—If you say there was, then please state of what such negligence consisted, and state what nurse or employe was negligent. Ans. Dr. Ernest C. Wheeler. General neglect.

"No. VIII.—In the event that you find from the evidence that the plaintiff sustained any damage because of treatment subsequent to November 8, 1907, then state of what such negligence consisted and the amount of the damage sustained. Ans. Not employing competent Doctors. Two Thousand no-100 dollars."

On the return of this verdict the plaintiff moved, first, for a joint and several judgment against all three defendants, in the sum of $7,000; or second, for a joint and several judg-

ment against the Hospital Association and Wheeler in the sum of $5,000, and a joint and several judgment against all three defendants in the sum of $2,000; or third, for a judgment on the general verdict, special findings, pleadings and testimony. On the other hand, the Hospital Association and the Casualty Company moved for a judgment in their favor notwithstanding the verdict, and later amended their motion by leave of the court and asked in the alternative that a joint and several judgment be entered against all three defendants in the sum of $1,000, to be satisfied as to all by the payment of the amount of the judgment into court by the defendant Wheeler. The court denied the several motions interposed by the plaintiff and granted the amended motion of the defendants. A motion for a new trial thereafter interposed by the plaintiff was denied, and from the final judgment of the court, this appeal is prosecuted.

It is almost needless to say that a verdict admitting of so many possible constructions should never be received or filed in a court of justice. But the verdict is before us and a judgment must follow, if the intentions of the jury can be gathered from their findings without violating the rules of law. We will first consider the several motions interposed by the appellant. The findings of the jury must be read in the light of the instructions of the court, and when thus read it becomes at once apparent that the appellant was not entitled to a joint and several judgment in the sum of $7,000, against all three respondents.

The court below was of the opinion that the Hospital Association and the Casualty Company were not jointly liable, and instructed the jury accordingly. The finding against each of these respondents was, therefore, for its own negligence only, and not for the negligence of the other. On the other hand, the finding against the respondent Wheeler was for his negligence, "individually and not as agent or servant or employee of the other defendants." To render a joint and several judgment against the several respondents on such

a verdict would be, first, to render judgment against the Hospital Association and the Casualty Company for damages resulting from the negligence of the respondent Wheeler, individually and not as their agent, servant or employee; second, to render judgment against the respondent Wheeler for the negligence of the other respondents, other than through his own acts; and third, to render judgment against each corporation for the negligence of the other. For the like reason a joint and several judgment in the sum of $5,000 should not be rendered against the Hospital Association and Wheeler, or a joint and several judgment in the sum of $2,000 against all three respondents. We might say in passing that the judgment actually entered by the court was equally erroneous and inconsistent, for it gave judgment against the two corporations for the individual negligence of Wheeler while acting on his own responsibility, and not as their agent, servant or employee. We simply refer to this fact to show the numerous difficulties encountered by the court in its attempt to render a consistent judgment on such a verdict.

We can best consider the claim of the appellant for a judgment on the general verdict, special findings, pleadings and testimony, in connection with the claim of the Hospital Association and the Casualty Company for a judgment in their favor notwithstanding the verdict. The claim of the two latter companies is substantially this: The only negligence charged or proved against them was the negligence of Wheeler, their agent and employee, for whose negligence they are only responsible under the doctrine of *respondeat superior;* that their liability cannot exceed his liability; that the jury found no damages against Wheeler while acting as their agent, servant or employee, and that, therefore, a judgment should be directed in their favor, on the authority of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *Sipes v. Puget Sound Elec. Co.*, 54 Wash. 47, 102 Pac. 1057, and other cases in this court.

It must be conceded that the gravamen of the appellant's complaint was the negligence of the respondent Wheeler, and nearly all the testimony was directed toward establishing negligence, inattention, and incompetency on his part. It must likewise be conceded that the jury have found no damages against the respondent Wheeler for negligence while acting as agent, servant or employee of the other respondents; and if the record were otherwise silent, this verdict would have to be construed as an affirmative finding in his favor, under the authorities above cited. But the jury did find, in answer to the 6th, 7th and 8th interrogatories, that the respondent Wheeler was negligent and incompetent as the servant and employee of the Casualty Company, and this finding discloses another inconsistency between the general verdict and the special findings. The appellant suggests that the verdict against the respondent Wheeler, individually, is based on the fact that he treated the appellant individually between the 11th day of November and the 10th day of December. This suggestion is probably the correct explanation of this part of the verdict, for if the individual finding against Wheeler is not based on that fact, we are entirely at a loss to find any support for it in the record. On the other hand, however, the jury found, in answer to the special interrogatories, that Wheeler was negligent as agent and employee of the Casualty Company during the same period. While, therefore, the jury failed to find damages against Wheeler as agent, servant or employee of the other respondents, in the general verdict, they did find such negligence in their special findings, and the motion for judgment *non obstante* was properly denied.

Nor do we think the appellant was entitled to a several judgment against the individual respondents on the verdict of the jury. As already stated, the gravamen of the appellant's case, under his complaint and testimony, was the negligence and incompetency of the respondent Wheeler, and unless that fact was found against each of the other respondents, the

testimony would not sustain any considerable judgment against them. The permanent injury to the appellant resulted from the negligence and incompetency of the respondent Wheeler, if it resulted from negligence at all, and in the absence of a finding fixing the responsibility for such negligence on either the Hospital Association or the Casualty Company, or both, no verdict such as was here returned should be permitted to stand.

From a careful consideration of the entire record we are convinced that there was a substantial mistrial in the court below, and that a new trial should be awarded here. It is so ordered.

GOSE, MORRIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 8774. Department One. May 27, 1910.]

NELLIE BUCKLES, *Respondent*, v. JOHN W. REYNOLDS, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—TRIAL—MISCONDUCT OF COUNSEL. In an action for wrongful death, the remark of plaintiff's counsel in his closing argument to the jury, that the only defense is the time-worn plea of contributory negligence which is always put forth in such cases, while unfair and not based upon the evidence, is not such a misstatement as to mislead the jury and require a new trial, especially where the court instructed that it was the duty of the jury to follow the rules of law laid down by the court.

WITNESSES—CROSS-EXAMINATION—DISCRETION. Where the defendant had testified as to the rate of speed he had been in the habit of running his automobile, it is discretionary for the trial court to allow cross-examination as to the speed he had run on a specified occasion, for the purpose of testing his accuracy of recollection.

PARTIES—DEFECT OF PARTIES—OBJECTION—DEMURRER. In an action by a widow for the death of her husband, error cannot be predicated upon the overruling of a general demurrer for want of sufficient facts, on the theory that it did not appear that she was the sole

[1]Reported in 108 Pac. 1072.

party in interest under Rem. & Bal. Code, § 183, authorizing an action by the widow and children of the deceased; inasmuch as, under Id., §§ 259, 261, the objection to defect of parties must be by special demurrer or answer.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered October 26, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Will H. Thompson, for appellant.

W. W. Langhorne and *Hayden & Langhorne*, for respondent.

CHADWICK, J.—This was an action to recover damages for the death of respondent's husband, claimed to have been caused by the negligence of defendant in driving his automobile. The defense, after admitting the ownership of the machine, the collision, and death of plaintiff's husband, was a general denial and the affirmative defense of contributory negligence. The evidence is conflicting, and it is admitted that, upon the disputed questions of fact, we would be bound by the verdict of the jury but for the misconduct of counsel in making his closing argument to the jury. The theory of appellant is that an examination of the evidence will show that the defense of contributory negligence was so strongly maintained that, but for the argument of counsel made after the defense had closed and could not be heard further, and the neglect of the court to reprimand counsel or warn the jury so as to destroy the force of his intemperate remarks, the verdict could not have been otherwise than for the defendant. Hence defendant is entitled to a new trial. The argument and ruling of the court complained of is as follows:

"(Attorney for respondent): In this case the plaintiff, Nellie Buckles, who is the widow of John W. Buckles, sued to recover the sum of $25,000 for damages she alleges she sustained by reason of the death of her husband. Now if

he was killed through the negligence of John W. Reynolds, then John W. Reynolds is responsible for any loss that she may have sustained through his death. If that accident or if the death of Buckles was caused by any act or if he did anything that proximately contributed to his own death, then under the law, as given by his honor on the bench, Nellie Buckles cannot recover in this case. Now, I don't dispute that proposition for an instant, but I do dispute, gentlemen, some of the conclusions that the learned counsel has drawn from the charge of the court as given you in this case and I do intend to dispute with all the energy I have got certain deductions he made from the evidence in this case. Whenever a man is sued for damages, whenever he is sued—if he ever occasioned loss to any one, whenever he is sued for damages by reason of occasioning the death of another, the old time-worn plea—

"Attorney for appellant, interrupting: I object to that; (continuing) that always is made—

"(Interrupting): I object to counsel making any such a statement as to what is done with the other cases. The Court: Exception noted. Proceed with the argument.

"(Continuing): Whenever a man is sued because of his act that occasioned the death of another the old time-worn plea is put forth, always has been put forth, always will be put forth, because the only plea that can be put forth is that the man that was killed was guilty of contributing—was guilty of negligence, he contributed to his own death. That is the only plea that can be put forth when a man is sued for damages. Now, what is contributory negligence that will bar a man or his legal representatives from recovering damages in an action of this kind."

That the argument was unfair and not based upon the evidence, but upon the pretended experience of counsel, and that the court should, in ruling upon the objection, have warned the jury to disregard the offensive remarks, may be admitted; but for this court to say, as a matter of law, that the jury, which we must presume was made up of men of fair intelligence, was misled thereby, would be to presume that the jury had disregarded all the evidence and followed the argument of counsel to the exclusion of all else, as well as the

instructions of the court. Few verdicts would be sustained if courts indulged the presumption that juries had been misled by the intemperate excesses of counsel in oral argument. We must rather indulge in hope, if not the presumption, that they will dispassionately consider remarks that are not sustained by the evidence; especially so when the court has instructed them, as he did in this case, that it was the duty of the jury to follow the rules of law laid down by the court. There is no fixed rule upon this question.

"We doubt not that many cases may arise in which the misconduct of counsel, in going outside of the evidence in his argument, may be such as to compel a reversal. No one can doubt the impropriety of such conduct. In doubtful cases it may be that which turns the scale, and determines the verdict. And a court, especially a trial court, should be exceedingly careful to restrain such misconduct, and punish the offender personally, and by setting aside every verdict which it has reason to believe has been affected thereby. But to hold that every such misconduct should be visited by a reversal of the judgment, would be unjustifiable rigor, and ofttimes doing as much or greater wrong than the misconduct itself. Who does not know that in the excitement of an argument there occasionally fall from the lips of counsel statements of matters not in evidence? Familiar with all the facts and history of the case, it is not strange that he sometimes refers to facts not proven. Should the client suffer by loss of his verdict, for every such offense of his counsel? Clearly there would be no justice in that. All that can safely be laid down is, that whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. In this case the trial court overruled the motion to set aside the verdict. Doubtless it appeared to it that there was no intentional wrong, and that the matter was not of itself sufficient to have influenced the minds of the jury. . . ." *Winter v. Sass*, 19 Kan. 556, 566.

In *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E.

381, the remark that "for more than twenty years he had stood as an humble advocate of the people against monopolies such as this," was held to be culpably out of place, but not of itself sufficient to warrant a new trial. In *Henry v. Centralia & Chester R. Co.*, 121 Ill. 264, 12 N. E. 744, the remarks complained of were as follows:

"This railroad will benefit the public and each of us, if built. If you fix these damages too high, the company will not pay them, and the railroad will not be built. We will never get railroads if they have to pay such damages for right of way."

The court said:

"But it is not to be assumed that every mis-statement of law or of fact will have the effect of exciting improper prejudices. The instructions of the court and the good sense of a competent jury are a sufficient protection against ordinary errors of statement and false arguments of counsel."

In *Texas & Pac. R. Co. v. Raney* (Tex. Civ. App.), 23 S. W. 340, the court said:

"In his closing argument counsel for appellee used this language: 'The defendant is a corporation, that has neither soul nor feeling, and the only way you can reach it is through the pocket.' . . . While we do not approve of this language, and see nothing in the record to justify its use, yet it will not do to set aside verdicts for every extravagant remark made by counsel in the heat of argument. The jury must be presumed to be men of discretion, and when the trial judge, who is in the best position to decide, concludes they have not been improperly influenced by remarks of this kind, we will not overrule his judgment unless the record makes it appear reasonably probable that an erroneous result has been thereby produced. *Radford v. Lyon*, 65 Tex. 477."

In *Rangenier v. Seattle Elec. Co.*, 52 Wash. 401, 100 Pac. 842, counsel said of a witness:

"Gentlemen of the jury, I once occupied the position upon the bench now occupied by His Honor. I have known Dr. Willis for fifteen years. He has come before me as a witness. I would not believe him under oath."

This court said, after crediting the jury with the possession of ordinary common sense:

"The lawyer speaks for his client, and the jury, in recognition of this fact, presumably treats his argument from this viewpoint. Indeed, experience and observation teach that fairness of counsel in the presentation of a cause is usually more persuasive with the jury than is an effort to secure a verdict by means of intemperate speech."

Appellant testified on direct examination as to the rate of speed he had been in the habit of running his machine, fixing variously four, twelve to fifteen, and seven miles an hour. On cross-examination he was asked:

"Q. Now, what is there that attracted your attention and makes you remember the rate of speed you were going down Market street on that day and at that time? A. How is that? Q. What is it that recalls to your memory so that you can definitely fix the rate of speed you were going down Market street at that time? A. I had driven the car quite a lot—by the way the engine was running. Q. Now, do you remember an occasion of when you run your automobile in the public streets at a time when they were holding an automobile meet over there, or had an automobile race, the automobiles going into Olympia, that being the point of arrival? A. Yes, sir. Q. You remember running your automobile, running your automobile down the main street in Olympia on that day? Mr. Thompson: We object. It cannot have anything to do with this case. The Court: Objection overruled and exception allowed. Q. Now, Mr. Reynolds, how fast did you run your automobile down the main streets of Olympia that day? A. It has been so long ago I haven't thought about it. I would not know hardly how—perhaps 20 miles an hour. Q. What is your best recollection of that? A. 20 miles an hour. Q. Down the main streets of Olympia? A. Yes, sir, that is down pretty near to the Mitchell Hotel. Q. Don't you think it was a little faster than 20 miles, Mr. Reynolds? A. Well, no. Q. Don't you think it was nearer 40? A. No, sir. Q. It was 20 miles an hour, wasn't it? A. Yes, sir. Q. You know that was a rate prohibited by law, don't you? Mr. Thompson: I object. The Court: I think the objection should be sustained. This examination about the speed was

permitted to show his accuracy of recollection about speed; the objection is sustained. Q. You think you were not going down the streets of Chehalis on this day as fast as you went down the streets of Olympia at the time you speak of? A. No, sir. Q. You were not going that fast that day? A. No."

We think the testimony was proper, on the theory suggested by the trial judge, and when it became evident that counsel might go beyond a proper limit, the examination was promptly checked. A wide latitude is usually, and should be, given upon cross-examination, the extent of which must be governed largely by the discretion of the trial court. *Williams v. Spokane & N. R. Co.*, 42 Wash. 597, 84 Pac. 1129. Therefore, unless it seems most likely that prejudice resulted to the opposite party, courts should hesitate to control the discretion of the trial judge in matters of this kind.

It is contended that the court erred in overruling a demurrer to the complaint, in that it did not show that respondent had a sole interest in the recovery. Counsel relies upon section 183, Rem. & Bal. Code. We do not consider this question to be properly before us. The demurrer was a general demurrer; that is, that the complaint did not state facts sufficient to constitute a cause of action. It has been held, under sections 259, 261, Rem. & Bal. Code, that a demurrer in this form does not raise the question of defect of parties. *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37. If the defect appears on the face of the complaint, the objection must be taken by demurrer. *Hale v. Crown Columbia Pulp and Paper Co.*, 56 Wash. 236, 105 Pac. 480. If it does not appear on the face of the complaint, such objection must be taken by answer. *First Nat. Bank v. Hamor*, 49 Fed. 45. And if not taken by either demurrer or answer, the objection cannot be urged on appeal. *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

Rudkin, C. J., Gose, Morris, and Fullerton, JJ., concur.

[No. 8686. Department One. May 27, 1910.]

City National Bank of Lafayette, *Respondent*, v. S. L. Mason *et al.*, *Appellants*.[1]

Bills and Notes—Action by Indorsee—Defenses—Fraud—Burden of Proof. In an action by an indorsee upon a promissory note given for the purchase price of a horse, defended on the ground of fraud and breach of warranty, in which plaintiff relied upon a prima facie case without proof of the manner of acquiring the note, sufficient evidence that the payee procured the note and a waiver of the warranty by fraud shifts the burden to the plaintiff to establish that it is a holder in due course.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered December 8, 1908, in favor of the plaintiff, upon withdrawing the case from the jury at the close of the evidence, in an action on a promissory note. Reversed.

Lorenzo Dow, for appellants.

Raymond J. McMillan, for respondent.

Morris, J.—Respondent, claiming to be the holder, seeks recovery upon a promissory note given by appellants to J. Crouch & Son, as part of the purchase price of a stallion. The answer sets up fraud and misrepresentations in the obtaining of the note; that its consideration was the purchase of a stallion for breeding purposes, and that there was an express warranty that the stallion was fit for breeding purposes; that, at the time of the sale and warranty, the horse was diseased in his reproductive organs, and was incapable of

[1]Reported in 108 Pac. 1071.

begetting colts; that the disease was of a latent nature, unknown to appellants, and such as an inspection of the horse by them would not determine, but that the defect was fully known to the vendors; that this diseased condition was fraudulently concealed from appellants, and that they purchased the horse and executed the note upon full reliance upon the warranty. Facts are then set forth to show the breach of the warranty, the diseased condition of the horse long prior to the sale, the knowledge of the vendors as to this condition, and that the note was transferred to plaintiff by J. Crouch & Son with full notice of the defense.

The evidence fully establishes the fact that the horse was diseased and worthless for breeding purposes. The court, however, was of the opinion that appellants had waived the warranty by signing a writing which purports to be such a waiver, and took the case away from the jury upon plaintiff's motion, and entered judgment. We think this was error. There is, to our mind, sufficient evidence to submit the question of fraud in the obtaining of both the note and the so-called waiver. Plaintiff relied upon a *prima facie* case, and gave no evidence of the manner, time, or consideration of its purchase of the note. If, however, there was any evidence to show that J. Crouch & Son obtained the note and the waiver of warranty by fraud, then the burden shifted to the plaintiff to show it was a holder in due course. As before intimated, we think the evidence of fraud on the part of J. Crouch & Son was sufficient to carry the case to the jury, and that the court erred in not so ruling.

Reversed and remanded for new trial.

Rudkin, C. J., Chadwick, Fullerton, and Gose, JJ., concur.

[No. 8871. Department Two. May 27, 1910.]

THEODORE GUNTHER *et al.*, *Plaintiffs*, v. WM. A. HUNEKE, *as Judge of the Superior Court for Spokane County, Respondent.*[1]

INTOXICATING LIQUORS—LOCAL OPTION — STATUTES — CONFLICTING ACTS. The local option law of March 12, 1909 (Rem. & Bal. Code, § 6992), providing that the portion of each county outside of certain cities and towns shall be a unit and shall decide upon the question of the sale of intoxicating liquors, is in direct conflict with, and being the later enactment controls, the act of March 3, 1909 (Rem. & Bal. Code, § 9339½), providing that each township in counties in which the township government has been adopted shall have the power to determine whether licenses for the sale of intoxicating liquors shall be issued therein.

SAME—STATUTES—APPLICATION—REPEALS—LEGISLATIVE POWER—RESTRICTING SUBSEQUENT ACTION. The local option law of 1909, being a general law applicable to all counties of the state, prevails over previous enactments, and applies to counties that had already adopted township government whereby a different system of regulation was provided, notwithstanding that an amendment to the township government act (passed previously at the same session of the legislature) provided that no act thereafter passed shall be construed as altering, amending or repealing any of its provisions; since repeals by implication cannot be thus prevented.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered May 3, 1910, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the holding of an election under the provisions of the local option law. Affirmed.

R. M. Webster and *Richardson & Laughon*, for plaintiffs.

Fred C. Pugh, *Donald F. Kizer*, and *Boyd P. Doty*, for respondent.

MOUNT, J.—An action was brought in the superior court of Spokane county to enjoin an election about to be held for

[1]Reported in 108 Pac. 1078.

the purpose of determining whether licenses shall be issued for the sale of intoxicating liquors in Spokane county outside of incorporated cities and towns, under the provisions of the act of March 12, 1909, commonly known as the local option law. The lower court sustained a general demurrer to the complaint, and dismissed the action. It appears that the election is to be held on May 31, 1910, and that there is no adequate remedy by appeal. A writ of review was therefore issued.

It appears from the complaint that the county of Spokane, outside of incorporated cities and towns, has adopted township organization under the act of March 23, 1895; that at the regular annual town meeting held in March, 1910, each of the townships in said county determined for itself the question whether licenses should be granted for the sale of intoxicating liquors therein for the current year; that two of such townships determined that such licenses should be granted, while all the rest of such townships determined that licenses should not be granted in the respective townships; that afterwards a petition was filed asking for an election to determine whether licenses shall be granted for the sale of intoxicating liquors outside of cities and towns, under the provisions of the act of March 12, 1909. This election is to be held on May 31, and this action seeks to enjoin such election. The question in the case is, whether these townships are controlled in regard to the sale of intoxicating liquors by the act of 1895, and the amendments of 1909, relating to township organizations, or whether they are controlled by the local option law of 1909 (Laws 1909, page 153; Rem. & Bal. Code, § 6292 *et seq.*). The act of 1895, as amended on March 3, 1909 (Laws 1909, page 75, § 3; Rem. & Bal. Code, § 9339½), provides that these townships are bodies corporate with power:

"Tenth. To determine whether license shall be granted for the sale of spirituous, malt or intoxicating liquor in said town; and unless a majority of the electors present and vot-

ing at the annual town meeting shall vote by ballot in favor of granting a license in their town for the year then next ensuing, no such license shall be granted to sell liquor in said town for that year."

Section 1 of the local option law provides units of territory, for the purposes of an election upon the question whether the sale of intoxicating liquors shall be permitted in any county, among others, as follows: "that portion, considered as a whole, of each county containing any such city, cities or fourth class towns outside of its or their boundary lines. Each subdivision of territory as above shall be a unit to itself and may vote as such upon the question of the sale of intoxicating liquor within its boundaries." Laws 1909, page 153 (Rem. & Bal. Code, § 6292). The clause "such city, cities or fourth class towns" refers to cities of the first, second, third, and fourth class, and unclassified cities of more than one thousand population. It is apparent that, if the local option law applies to counties which have adopted township organization, then the election may be held, and the portion of the county outside of excepted cities and towns is controlled by such law in regard to the right to issue such license, for the act is a general act and such counties are not excepted.

It is argued by counsel for the relators that, because the constitution of the state provides for township organization of counties, and that the business of the several townships shall be conducted in the manner provided by the act authorizing such organization, therefore, when organized, such townships become constitutional divisions, and each may determine for itself the conduct of its local affairs in accordance with the act creating it. This position is sound where there is no conflict between general laws and the one relating to such townships. The constitution provides, at section 4 of article 11:

"The legislature shall establish a system of county government, which shall be uniform throughout the state, and by general laws shall provide for township organization, under

which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of several townships therein, shall be managed and transacted in the manner prescribed by such general law."

Section 11 of the same article provides:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

These provisions make it plain that townships as well as counties, cities, and towns are subject to general law, and the management of the business thereof is subject to control by the legislature, which is of necessity supreme, and which may alter or amend at will by general law, either directly or by implication, any general or local law or regulation. It is said that the term "such general law," as used in the section first quoted, refers only to laws relating to township organization, which is no doubt true; but these words do not mean that general laws, applicable to the whole state without specifically excepting such townships, are not as controlling therein as the same are in counties or cities of other classes. These constitutional provisions do not in any manner take away from the legislature the control of such townships in all of the affairs thereof by general law. Both the township act and the local option act are general laws. By the former act it is provided that each township shall have power to determine whether licenses shall be issued for the sale of intoxicating liquors therein. By the latter act it is provided that the portion of each county outside of certain cities and towns shall be the unit, and shall decide upon the question of the sale of intoxicating liquors within its boundaries. There is no exception of counties where township organization has been established, and no exception of such townships. The

two acts, if they cover the same territory, are in direct conflict upon this question and cannot stand together. The local option law is the latest enactment and must control. *Pierce v. Commercial Inv. Co.*, 30 Wash. 272, 70 Pac. 496; *Tatum v. State*, 79 Ga. 176, 3 S. E. 907; *Cooper v. Shelton*, 97 Ky. 282, 30 S. W. 623.

It is argued by relators that the local option law does not relate to counties where township organization has been adopted, because at the time of the passage of the local option act there were two forms of county government, one by organized townships, and the other without such organized townships; and, also, because the amendment to the act of 1895, conferring upon townships the right to control the sale of intoxicating liquors, was passed at the same session of the legislature which passed the local option act; and, also, because an amendment to the township organization act provided, that "No act that shall hereafter become a law shall be construed as in any manner altering, amending or repealing any provisions of this act unless such act expressly so provides." Laws 1909, page 80, § 12 (Rem. & Bal. Code, § 9438).

There is much force in all these reasons, but the legislature could not have been ignorant of the fact that Spokane county had adopted the township organization. The local option law, while passed at the same session as the amendment to the township organization act, was passed after those amendments. The local option law is a general law, and applicable to all the counties of the state without exception. It is a later act, and must prevail over previous enactments upon the same subject. The amendment of the township act, to the effect that no act which shall hereafter become a law shall be construed as altering, amending, or repealing any of the provisions of this act, unless expressly so provided, could not, of course, prevent the same or a subsequent legislature from enacting an inconsistent law, which would necessarily repeal a former enactment even though no reference was made to the

former law. What one legislature may do, the same or another legislature may directly or indirectly undo. This amendment amounted to no more than the general rule, which is that repeals by implication are not favored. But where two provisions are entirely inconsistent, as the ones under consideration appear to be, one must necessarily fall.

In view of the fact that the local option law applies to all the counties of the whole state without any exception, there seems to be no escape from the conclusion that all counties are included within its provisions. The lower court, therefore, properly sustained the demurrer to the complaint, and the judgment must be affirmed.

DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8859. Department Two. May 28, 1910.]

KENNEDY DRUG COMPANY, *Respondent*, v. KEYES DRUG COMPANY *et al.*, *Appellants*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS AND EXHIBITS. Unless incorporated in a bill of exceptions or statement of facts, affidavits and exhibits cannot be certified to the supreme court by the trial judge or considered on appeal.

APPEAL AND ERROR—RECORD—NECESSITY — MOTIONS — CERTIORARI. An application for a writ of certiorari and a motion to advance the hearing of an appeal will not be considered until the record on appeal has been made up and filed in the supreme court.

Application filed in the supreme court May 11, 1910, for a writ of mandate directing the superior court for King county, Main, J., to certify certain exhibits and affidavits to be used on appeal, also for a writ of certiorari, and for other relief. Denied.

McCafferty, Robinson & Godfrey, for appellants.

Higgins, Hall & Halverstadt, for respondent.

[1]Reported in 109 Pac. 56.

PER CURIAM.—This is an application for a writ of mandate to require one of the judges of the superior court of King county to certify to certain affidavits and exhibits used on the hearing of an application for the appointment of a receiver, in a certain action pending before him in which an appeal has been prosecuted to this court. The judge to whom the application to certify was made denied the application on the ground, and for the reason, that no statement of facts or bill of exceptions had been filed or served in the cause. The application for the writ of mandate must be denied. Affidavits read on the hearing of an application for the appointment of a receiver form no part of the record (*Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543, 45 Pac. 141); and under our practice, matters and proceedings not already a part of the record can only be made so by bill of exceptions or statement of facts. Rem. & Bal. Code, § 388. The only reference in our statute to depositions and other written evidence is found in § 390, Rem. & Bal. Code, and under that section, such documents must be incorporated in a statement of facts or made a part thereof by proper reference.

We have repeatedly held that cases of this character will not be heard in this court on the testimony taken in the court below, in the absence of a statement of facts certified by the trial judge to contain all the material facts, matters, and proceedings occurring in the cause and not already a part of the record therein, or such as the parties have agreed to be material. In the present case, the return of the trial judge states that the proposed affidavits and exhibits do not contain all the testimony introduced at the hearing, and this affords an additional reason why the writ should be denied. The affidavits could not be considered by this court if certified as requested.

The application for a writ of mandate is accompanied by an application for a writ of certiorari, and by a motion to advance the hearing of the appeal before this court, but

these applications will not be considered until the record is made up and filed here. For the reasons stated, the several applications must be denied, and it is so ordered.

[No. 8810. Department Two. May 28, 1910.]

THE CITY OF SEATTLE, *Respondent*, v. JOHN P. DENCKER, *Appellant*.[1]

CONSTITUTIONAL LAW—CLASS LEGISLATION—LICENSES—OCCUPATION TAX—DISCRIMINATION. A city ordinance providing a license tax upon the sale of goods of any kind by means of any automatic device violates the constitutional prohibition against granting to any citizens special privileges and immunities which upon the same terms do not equally belong to all citizens; since it discriminates against a simple mode of doing business which is conceded to be lawful and fair, and in no way involves the police power.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 28, 1910, upon a trial and conviction of the violation of an ordinance relating to the sale of goods by automatic vending machines. Reversed.

Lyter & Folsom and *I. L. Blair*, for appellant.

Scott Calhoun and *Ralph S. Pierce*, for respondent.

DUNBAR, J.—This is an appeal from a judgment of the superior court for King county, after trial upon conviction of the violation of an ordinance of the city of Seattle relating to the sale of goods by automatic vending machine, which ordinance reads as follows:

"An Ordinance licensing certain automatic devices, and providing a penalty for violation.

"Be it ordained by the city of Seattle as follows:

"Section (1) That it shall be unlawful for any person to maintain, keep, conduct, manage, have in his possession or control for use, any automatic device for the sale of goods of any kind or character, where money or any repre-

[1]Reported in 108 Pac. 1086.

sentative of value is used to operate the same, or where gain or trade is the object, without being licensed so to do by the city of Seattle.

"Section (2) The license required by this ordinance shall be secured by paying the required amount to the city treasurer, receiving a receipt therefor and presenting such receipt to the city comptroller, who shall issue such license as the receipt calls for.

"Section (3) The schedule of amounts to be paid for licenses, is as follows: Where a deposit of one (1) cent or slug representing the same in trade, is required to operate the same, one (1) dollar per year for each device; where a deposit of five (5) cents or slug representing the same in trade, is required to operate the same, five (5) dollars per year for each device; where a deposit of ten (10) cents or slug representing the same in trade, is required to operate the same, ten (10) dollars per year for each device; where a deposit of twenty-five (25) cents or slug representing the same in trade, is required to operate the same, fifteen (15) dollars per year for each device.

"Section (4) The provisions of this ordinance shall not be held to include or apply to the sale of gas, or other commodities, through prepayment meters, or the installation and use of telephones with slot machine devices, by public service corporations, operating under franchises granted by the city of Seattle, or to the sale of candies or similar confections, by automatic devices in theaters or other such places of public assembly where a fee is charged for admission."

Defendant is the manager of the Northwestern Automatic Vending Machine Company, a Washington corporation, which is engaged in the business of selling cigars at retail by means of vending machines; owns and operates a great many of these machines in the city of Seattle, and has invested a large sum of money in said machines. The machines are placed in hotels where cigars are required by the patrons, are under the general supervision of the clerks of the hotel, and as a rule, a certain percentage is given to the hotel men for operating the machines. Under the ordinance in question, the license fee required for the operation of the machines varies from $30 to $95, according to the number of

devices, the fee being based on the denomination of the coin required for operation and the number of devices, and not on the amount of business done. Each machine has a device for five, ten, and twenty-five cent pieces. The cigars are at all times exposed to view under their proper labels and prices, so that the purchaser can at all times see what he is getting for his money, and he gets just what he pays for. If he drops in a five-cent coin in the device calling for a coin of that denomination, and presses the plunger, he gets a five-cent cigar; if a ten-cent coin, a ten-cent cigar; and if a twenty-five-cent coin, either a two-for-a-quarter or a three-for-a-quarter cigar, according to his selection. There is no more opportunity for the customer being cheated or defrauded in dealing with this device than by any other one.

The question for determination here is the validity of the ordinance. It is conceded that this ordinance is a revenue measure; that the only ground of difference between licensed and unlicensed sales in this ordinance is in the mode of sales, whether by device or hand. It is conceded that none of the other retail merchants of that occupation are taxed by licenses for the sale of cigars; that if the sale is by this device the license is imposed, and that if it is by hand, in the ordinary way, no license is required.

In the discussion of this question there are certain fundamental principles which may be conceded, viz: That it is a well-known attribute of sovereignty to tax occupations for the purpose of raising revenue, and that such tax may be imposed in the form of a license fee; that the state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others; that only considerations of general policy determine such selections, and that there is no restriction unless it be imposed by the constitution. This determination, however, must not be exercised arbitrarily or fraudulently, and while the policy of the enactment may not be questioned by the courts, the discretion exercised by the law-making power

must be natural and reasonable, and consistent with the general principles of law and the fundamental principles upon which our government is founded. When these principles are violated to the extent of depriving the citizen of natural or constitutional rights, it is the duty of the court to intervene in his behalf. A wilderness of authority might be cited on this interesting and fruitful subject of litigation; for, from the beginning of not only our government but of all government, the contest has been waged between legislative powers and individual rights. But from the best considered cases, the general principles above announced can be deduced.

Tested by these principles, can this ordinance be sustained? We think not. It is plain that there is no police power or regulation involved, a power which is the sustaining principle in ninety-nine out of a hundred of the cases cited; for there is no claim that the business discriminated against here affects in any way the public morals or the business interests of the community, except as it affects the interest of others engaged in the same business but purely in the way of competition. The article that is sold does not in any way involve the police power. Hence, it is a matter of no public concern whether it be sold by device or by some other method. And here it is well to note a vital distinction, founded on sound and just principles of law, between the power to tax occupations under the form of a license which, by reason of the character of the occupation, is subject to police regulation, and the power to tax what are termed useful trades and employments, under the guise of a license. It is well settled that the license required of employments of the latter character can carry with it only such fee as is necessary to make compensation for the regulation services, and cannot be perverted into a tax. Especially is this true when the attempt is made to discriminate between occupations alike in principle but differing only in mode of operation in some trifling particular.

The respondent relies largely upon the case of *St. John v. New York*, 201 U. S. 633, where the supreme court of the United States sustained an act prohibiting the sale of adulterated milk, where in certain respects it provided different prohibitions and penalties as to producing and non-producing vendors of milk, the enactment making it a penal offense for a person to vend milk that contained more than a certain amount of water and less than a certain amount of milk solids. The objection urged to the law was that it was a discrimination between the vendor and the producers of the milk, and that such discrimination had no basis in right or public policy. In discussing the case, the court said:

"It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. By referring to section 20 it will be observed that adulterated milk, as there defined, includes not only that to which something has been added, but milk from which the cream has been removed, or which is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be 'unclean, impure, unhealthy, adulterated, or unwholesome.' It is not contended that such purpose is not within the power of the state but, it is contended, that the power is not exercised on all alike who stand in the same relation to the purpose. . . . legislation to be practical and efficient must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condi-

tion that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vendor, he is exempt from the penalty; as it cannot certainly be proved in the hands of other vendors so as to prevent evasions of the law, such vendors are not exempt."

It would be difficult to discover in principle any similarity between that case and the one at bar. The court in that case, as in nearly all the cases, starts out with the discussion as to what is the purpose of the law. The purpose of the law in the case just cited was to prevent the adulteration of milk, which the state undoubtedly had a right to do under its plain police powers, for the protection of the health of the citizen. But as we have before said, this case is stripped of any police feature, and if we were to start an investigation to determine the purpose of this act, it could only end in a report that there was no such beneficent purpose as was stated by the court in that case, but that the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of the delivery of the cigars; or in other words, to prevent honest competition in the cigar trade. The further reason upon which the court decided that case, viz., that it was more difficult to detect fraud when the milk was in the hands of the vendor than when it was in the hands of the original producer, is also absent in this case. As the testimony shows, and as the model of the machine indicates, there is no more opportunity for fraud or deceit in selling cigars under this system than in selling them in any other way.

The case of *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 123 Am. St. 100, 17 L. R. A. (N. S.) 684, also largely relied upon by the respondent, is practically the same kind of a case. Probably the circumstances of that

case bring it a little nearer to the case at bar. There an act was sustained which required dealers, selling cream and milk in bottles or glass jars, to have the capacity of the bottles or jars permanently indicated upon them; and prescribed a penalty for having in their possession bottles or glass jars of capacity less than that indicated on the outside; while the act did not apply to vendors of milk through other agencies. But that case, as the other, was sustained on the doctrine of the police power of the state. Even so, we are doubtful if that case could be indorsed by this court under the decision in *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263, where it was held that, in an ordinance to regulate and license employment agencies, a section making it a misdemeanor for the keeper of an employment agency to make wilful misrepresentations or to wilfully deceive any person seeking employment, and take a fee for such employment, is unconstitutional, since it is not general and impartial in its operation, but operates upon one class to the exclusion of others in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations. In that case it was stated that it is a fundamental proposition that an ordinance must be fair in its terms, impartial in its provisions, and general in its application; citing Dillon, Mun. Corp. 322, and McQuillan, Mun. Corp. 193. It was also said:

"When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition"; citing *State v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112, 31 Am. St. 650, where the court said:

"The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar."

A much worse discrimination would be a discrimination between citizens of the same class engaged in the same business, where there is no reason suggested by a difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business, a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article sold. The general principle announced by Mr. Dillon in his work on Corporations, vol. 1, § 322, seems to be specially applicable here:

"As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination*, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation."

The Montana legislature passed a law imposing a license tax of $25 per quarter on every laundry business other than that of a steam laundry wherein more than one person was employed or engaged, and but $15 per quarter upon steam laundries. This law was sustained by the state court of Montana, but was afterwards declared unconstitutional by that eminent jurist, Judge Knowles, of the United States circuit court, in *In re Yot Sang*, 75 Fed. 983. In the course of the opinion it was said:

"Unless there is something so different in the conducting of a laundry by steam to that of the carrying on of that business by any other means, the law providing a different and more excessive license for the conducting of such business other than by steam is unequal and unjust. . . . It may be said that the state may have wished to encourage steam laundries. If so, it had no right to do it at the expense of any person carrying on such business other than by means of steam. Such an argument would imply that it

was in the power of a state to force a man who conducted a business in one mode to abandon the same in order that he who conducted such business in another mode should be encouraged and built up."

The court concluded that, where the same business is conducted by different modes, it was unjust and in violation of the rule that each man should have the protection of equal laws, to place upon one a greater burden than upon the other. It is stated by counsel for appellant, as a matter of history, that, since the determination of this case in the United States court, it has been accepted as the law of the state, and that there have been no prosecutions under the statute. However this may be, we are satisfied that the decision of the United States court expresses the true principles governing such cases.

In the case of *Covington v. Dalheim*, 126 Ky. 26, 102 S. W. 829, the court, in passing upon the constitutionality of an act which imposes a tax on a certain class of grocers without the imposition of the same tax on others, held that the tax must apply to all grocers in the city, and that the act was unconstitutional, saying:

"It is competent for the city to select any of the enumerated classes as subjects for license taxes. But it is not competent for it to tax some members of a class set apart by the legislature and not tax others of the same class."

And the principle announced in that case was reaffirmed by the court of appeals of Kentucky in the case of *Read v. Graham*, 31 Ky. Law 569, 102 S. W. 860. These last three cases which we have mentioned seem to be exactly in point on the question under discussion.

It is very well suggested by counsel for appellant that it would be just as reasonable to discriminate against a merchant who used a patent carrier for the transmission of money and change, instead of a cash boy. The same rule might apply to a thousand different improvements that have a tendency to cheapen products by reason of the fact that

they are labor saving machines, and do away with the necessity for so many clerks and employees. It is a legitimate business, and it makes no difference to the public whether the cigar is delivered by means of this automatic device or in the ordinary way. A strict or puritanical conception of the business of selling cigars might be that it was harmful to the health of the consumers, but the mode of selling them would not enter into that thought. Nor can the objection that it is particularly attractive be urged, for handsome girls are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency.

Fairly considered, this seems to be a tax on invention, for invention in most cases, as in this, lessens the expense of the business, and thereby necessarily cheapens the product. This was one of the arguments advanced in favor of sustaining the validity of this ordinance, viz., that the machine could be manufactured and operated for less money than a retail cigar store could be equipped and operated. It would seem that the reduction in price of an article of commerce would savor of the quality of a blessing rather than of a curse, when the welfare of the consumer is taken into consideration; and to hold otherwise would reverse the general rule that legal restraints may be imposed upon the few for the benefit of the many. The tendency of this kind of an income is to foster monopolies, for a monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. It is said that it has three inseparable consequences—the increase of the price, the badness of the wares, the impoverishment of others. Hence, it naturally follows that monopolies are odious to the law, and the law will concern itself to restrain rather than to nourish them. If this ordinance can be sustained, there is no limit to the arbitrary, capricious, or tyrannical imposition of taxes, and the constitutional guaranty that "no law shall

be passed granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations," becomes a dead letter. Discrimination to the extent exhibited in this ordinance discourages enterprise, paralyzes progress, is a deprivation of liberty, and is entirely inconsistent with the true principles and the genius of our government. None of the cases cited, from either this or any other court, numerous as they are, go to the extent of discriminating against a simple mode of doing business, which is conceded to be lawful and fair, and which in no way involves the principles of police power or regulation.

The judgment will be reversed, with instructions to dismiss the action.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8233. *En Banc.* May 28, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Thomas Burke et al., Respondent*, v. BOARD OF COMMISSIONERS OF KING COUNTY *et al., Appellants.*[1]

CANALS—ESTABLISHMENT—SPECIAL ASSESSMENTS—STATUTES—CONSTRUCTION—INTENT OF FEDERAL GOVERNMENT. The resolutions and acts of Congress appropriating money to pay the cost of making investigations and preliminary surveys for the construction of the "Lake Washington Canal", upon the state's securing a right of way therefor for the benefit of the United States (which was done), with the proviso that nothing therein contained shall be construed as an adoption of the project, did not manifest any intention on the part of the United States to construct or operate the canal within a reasonable time, or at all, within the meaning of Rem. & Bal. Code, § 8148, authorizing local assessments by the county commissioners upon the property specially benefited for the purpose of paying the cost, in whole or in part, of constructing the Lake Washington

[1]Reported in 109 Pac. 350.

Canal, "whenever the government of the United States is intending or proposing the construction or operation" of such canal (Gose, Crow, and Fullerton, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Huneke, J., entered May 11, 1909, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to compel the equalization of an assessment roll and the levying of a special assessment upon property benefited by a local improvement. Reversed.

George F. Vanderveer, *Bogle & Spooner*, and *Peters & Powell*, for appellants.

Roger S. Greene, *Harold Preston*, *H. A. P. Myers*, and *Corwin S. Shank*, for respondent.

MOUNT, J.—This appeal is prosecuted from a judgment in mandamus, requiring the county commissioners of King county to equalize a local improvement assessment roll, and levy a special assessment to raise money for the construction of what is known as the Lake Washington canal. The roll was prepared by the county commissioners, acting under chapter 236, Laws of 1907, page 582 (Rem. & Bal. Code, § 8148 *et seq.*). By this act the legislature authorized the levy of a local assessment upon property specially benefited, to defray the expenses, in whole or in part, of a canal whenever the government of the United States is intending or proposing the construction or operation of such canal, and whenever the county commissioners shall judge the same to be for the general benefit and welfare of the people of the county. The act provides that proceedings shall be initiated by the filing of a freeholders' petition with the board of county commissioners, and that, when the board has adjudged that the improvement in question is for the general benefit and welfare of the people of the county, the board shall thereupon apply to the person who then shall be judge of the United States district court to name eleven commis-

sioners, to be known as the "River and Harbor Improvement Commission of ..... County." It is made the duty of the improvement commission to define and establish an assessment district in the county, comprising all the taxable real estate especially benefited by the improvement, and to apportion and assess benefits against each tract of land, and to make an assessment roll and certify the same to the board of county commissioners. The act further requires that, after the return of the assessment roll to the board of county commissioners, they shall make an order setting a day for the hearing of objections to the roll, and shall cause notice of such hearing to be given, and that upon a hearing the board shall sit as a board of equalization and equalize the roll.

On the 12th day of June, 1907, a freeholders' petition was filed with the board of county commissioners, praying the county commissioners to take the steps prescribed by the act for the creation of an assessment district, and the levying of an assessment of $1,075,000 to defray a portion of the expenses of constructing a canal, commonly known as the Lake Washington canal, connecting the waters of Puget Sound through Lake Union with the waters of Lake Washington. The petition states that the expense of the improvement will be more than $3,000,000. Pursuant to this petition, the board of county commissioners, on the 18th day of June, 1907, entered an order adjudging that such improvement was for the general benefit and welfare of the people of the county; that such assessment should be levied; that the cost of the canal would be $3,000,000, more or less, and that the assessment should be in the sum of $1,075,000, for the purpose of paying the expense of such improvement to that extent. On the 19th day of June, 1907, the board notified Honorable C. H. Hanford, judge of the United States district court for the western division of Washington, to name the improvement commissioners as

required by the act, and on the 24th day of the same month Judge Hanford named the commissioners and filed a list thereof with the board of county commissioners; and on the following day the board approved the selection. The commission so constituted made and defined the assessment district, prepared an assessment roll, and on the 29th day of May, 1908, filed the same with the board of county commissioners, who thereupon gave the required notice to the owners of the property appearing upon the assessment roll, and pursuant to such notice, many objections were filed. Upon the day set for the hearing of the objections, viz., the 24th day of September, 1908, the hearing was had, and after an adjournment until the 28th day of September, the board refused to proceed further with the work of equalization and adopted the following resolution:

"*Be it resolved* by the board of county commissioners of King county that the action of said board taken at a meeting held on the 24th day of June, 1907, wherein and whereby said board, on an *ex parte* hearing, made a finding that the government of the United States was intending and proposing the construction and operation of a canal connecting the waters of Puget Sound with Lake Washington, be and the same is hereby revoked and rescinded, said board, upon sufficient proof being now of the opinion, and having been advised, that there is no record in the Acts of Congress of a declaration of such intention on the part of the United States government.

"*Be it resolved* by the board of county commissioners of King county that it refuses and it hereby does refuse to sit as a board of equalization upon the assessment roll presented to it by the river and harbor improvement commission of King county, on the ground and for the reason that said board has no authority in law to equalize said roll, and that the law of 1907 in regard to the creation of said board of equalization is unconstitutional and void."

Thereupon the relators instituted this action, to compel the board of commissioners to proceed to equalize the roll and to levy the assessment. The defendants filed their answer, denying, among other things, that the government of

the United States is, or was, intending or proposing the construction or operation of the canal in question; denying the right or power of the court to control their action in the premises; and alleging the unconstitutionality of the act under which the proceedings were taken. A trial was had upon the merits. A judgment was entered in favor of the plaintiff as prayed for, and from that judgment this appeal is prosecuted.

The appellants rely upon three grounds for reversal of the judgment of the lower court, as follows: (1) That there has not been at any time since the passage of the act of 1907, and is not now, any intention or proposal of the United States to construct or operate the canal within the meaning of the act, and that therefore any assessment now made would be premature and unauthorized; (2) that the superior court has by its judgment sought to compel these appellants as a board of county commissioners to do an act which rests entirely in their discretion and which is beyond the control of the court; and (3) that the statute under which the judgment of the lower court compels the commissioners to proceed is unconstitutional. Under the view we take of the first question presented, it will be unnecessary to discuss the other two.

The intention or proposal of the United States government to construct or operate the canal in question, if such exists, is disclosed by the record before us, in substance, as follows: In the year 1890, Congress passed an act authorizing and directing the secretary of war to appoint a board of three officers of the corps of engineers of the United States army to select and survey the most feasible location and estimate the expense of construction of a ship canal to connect the waters of Lakes Union, Washington and Samamish with Puget Sound, and appropriated the sum of $10,000 for that purpose. 51 Congress, 1st session, page 452; 27 Stats. at Large 452. In 1894 there was appropriated by Congress, in the river and harbor act, $25,000, "for dredg-

ing Salmon Bay, and the improvement of the waterway connecting the waters of Puget Sound at Salmon Bay with Lakes Union and Washington, by enlarging said waterway into a ship canal, with the necessary locks and appliances in connection therewith." The following proviso, however, was added:

"Provided, that no part of said amount shall be expended on the improvement of the waterway connecting the waters of Puget Sound with Lakes Union and Washington until the entire right of way and a release of all liability to adjacent property owners have been secured to the United States free of cost and to the satisfaction of the secretary of war." 53 Congress, 2d session, page 360; 28 Stats. at Large, 360.

The sundry civil act of 1895 directed the secretary of war to expend from that appropriation the sum of $5,000 in making a definite survey and location of the improvement, and preparing a cadastral map showing each piece of property to be required to be deeded to the United States and from which a release should be required. The river and harbor act of 1896 carried a further appropriation of $150,000 for the purpose stated in the act of 1894, with the following phrase added: "Said canal to be constructed either by the Smiths Cove route or by the Shilshole Bay route, in the discretion of the secretary of war." 54th Congress, 1st session, page 234; 29 Stats. at Large, 234. In April, 1896, a joint resolution was passed by Congress (Id., page 471) directing the secretary of war to transmit to Congress the report of Captain Symons of the corps of engineers, upon the survey of the waterway connecting the waters of Puget Sound at Salmon Bay with Lakes Union and Washington, and also to submit an estimate of the cost of constructing said waterway on the route described in the report.

In 1895 the legislature passed an act (Laws 1895, page 3; Rem. & Bal. Code, § 901 *et seq.*), authorizing counties to condemn land,

"Whenever the government of the United States or of this state is intending or proposing the construction, operation, or maintenance of any public work . . . and such condemnation or appropriation will enable the county to aid, promote, facilitate or prepare for any such construction, operation, maintenance, or expenditure by either or both such governments, or to fulfill or dispose of any condition upon which such construction, operation, maintenance, or expenditure is by law or for any cause contingent."

The act provides for a tax levy to create a fund to defray the cost of such condemnation. The constitutionality of this act was attacked in the case of *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, a proceeding instituted against the county to restrain the prosecution of said condemnation proceedings; the act was sustained, and in the course of the decision it is pointed out by this court that the funds of the county can lawfully be expended for paying the condemnation awards, notwithstanding the fact that the canal is to belong to, and be under the control of, the general government; in which connection it is said to be "immaterial whether the United States or the county prosecutes the enterprise, or whether they do so jointly." Pursuant to the provisions of this last named act, King county, by suit and otherwise, acquired the title to the lands over which the proposed canal was to be built, and in August, 1899, King county made a deed of conveyance of the lands, acquired by the condemnation proceedings and otherwise, to the United States government. This deed was recorded June 23, 1900, at the request of the government engineer in charge of the Puget Sound district. The aggregate amount of the awards in condemnation was $255,642, all of which was paid by the county of King out of the tax levy made for that purpose. The deed recites the acts of Congress of 1894 and 1895, the passage of the act of the legislature of 1895, the making of the definite survey and location of the improvement by the engineer corps under the secretary of war, and their preparation of the cadastral

map then on file in the office of the secretary of war. It further recites the condemnation proceedings and decrees therein, and the resolution of the board of county commissioners authorizing the conveyance to be made. These appropriation proceedings and this deed vested in the government of the United States the entire right of way for the canal, and the release of damages from all owners of property abutting upon the bay and lakes. In April, 1900, the state of Washington, in order to further facilitate the building of the canal, deeded to the government certain tide lands adjacent to the town of Ballard, the same being a part of the proposed right of way of the canal.

It is conceded by respondent that the Congressional appropriations up to this date are for dredging Salmon Bay, and the improvement of the waterway connecting Puget Sound at Salmon Bay with Lakes Union and Washington by enlarging the waterway into a ship canal, speaking of the two as one. The dredging of Salmon Bay would be in part the dredging of part of the canal. It is also conceded that the dredging of Salmon Bay was a proper government improvement, even though the ship canal into Lakes Union and Washington should never be constructed. In 1902 Congress passed the following in the river and harbor act:

"Improving waterway connecting Puget Sound with Lakes Union and Washington, Washington: Continuing improvement, one hundred and sixty thousand dollars. Provided, That this appropriation, together with the unexpended balance to the credit of said improvement, shall be expended in securing by dredging a low-water channel ten feet in depth from Shilshole Bay through Salmon Bay to the wharves at Ballard. Provided, further, that a board of engineers shall be appointed by the secretary of war, who shall make such surveys, examinations, and investigations as may be required to determine the feasibility and advisability of constructing a canal, with necessary locks and dams, connecting Puget Sound with Lakes Union and Washington, of sufficient width and depth to accommodate the largest commercial and naval vessels, and said board shall prepare and

report plans and estimates of the cost thereof. Said board shall also examine the route for a similar canal connecting Elliott Bay with Lakes Washington and Union, with a view to determine the feasibility of such route, and shall invite proposals from the Seattle and Lake Washington Waterway Company for the construction of a similar canal over said route connecting Elliott Bay with Lake Washington, and similar proposals for connecting Elliott Bay with Lake Union through Lake Washington, said proposals to specify the time for the completion of each project, and all rights and privileges to be reserved by said company. Said board shall also report upon the relative advantages of all proposed routes. Nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget Sound with Lakes Union and Washington. Said board shall make its report, as above provided for, to the next session of Congress." 57th Congress, 1st session, page 347; 32 Stats. at Large, 347.

In February, 1901 (Laws 1901, page 7; Rem. & Bal. Code, § 6864), the legislature of this state passed an act entitled:

"An act relative to and in aid of the construction, maintenance and operation by the United States of America of a ship canal, with proper locks and appurtenances to connect the waters of Lakes Union and Washington, in King county, with Puget Sound, and declaring an emergency," whereby the state granted to the United States the right to place, construct, maintain, and operate such ship canal and appurtenances upon, along, through, and over any and all lands belonging to and waters of this state in King county, within such limits as should be defined by the plans and specifications for such improvement as the same shall be approved by the United States secretary of war, together with the right to raise the waters of Salmon Bay and lower the waters of Lake Washington in prosecution of such improvement; and the state thereby released the United States from all liability for damages to the state, its successors and assigns, that might arise from such lowering or raising of waters or otherwise from such improvement.

In 1905 (58th Congress, 3d session, page 1144; 33 Stats. at Large, 1144) Congress appropriated $125,000 in the following language:

"Improving the waterway connecting Puget Sound with Lakes Union and Washington, Washington. Continuing improvement, one hundred and twenty-five thousand dollars. Provided, that this appropriation, together with the unexpended balance to the credit of said improvement, shall be expended in securing by dredging a deeper and wider low-water channel from Shilshole Bay through Salmon Bay to the wharves at Ballard. Nothing herein shall be construed as the adoption of any project for the construction of the waterway connecting Puget Sound with Lakes Union and Washington."

In 1906 Congress passed an act (59th Congress, 1st session, page 231; 34 Stats. at Large, 231), entitled: "An act authorizing James A. Moore or his assigns to construct a canal along the government right of way connecting the waters of Puget Sound with Lake Washington." This act provided that it should be lawful for James A. Moore or his assigns to construct a ship canal not less than twenty-five feet in depth and with a bottom width of not less than sixty feet, with a suitable timber lock of not less than six hundred feet in length and seventy-two feet in width, along the government right of way connecting the waters of Puget Sound, in the state of Washington, with Lake Washington, subject always to the provisions and requirements of the act, and to such conditions and stipulations as might be imposed by the chief of engineers and the secretary of war, and that the construction of such canal by James A. Moore should not be made or commenced until after plans and specifications therefor had been submitted to the secretary of war for his approval, and that such work should be subject to the inspection of the secretary of war, and that it should not be lawful to deviate from such plans either before or after the completion of the structure. It also provided that the work should be constructed by James A.

Moore and his assigns free of cost to the United States, and should remain the property of the United States, and that said Moore and his assigns should operate the same for a period of three years. The act further provided that it should be null and void unless the canal was commenced within one year and completed within three years. Thereafter Congress made an appropriation (59th Congress, 2d session, page 1108; 34 Stats. at Large, 1108), as follows:

"Improving the waterway connecting Puget Sound with Lakes Union and Washington, Washington: For maintenance of improvement, ten thousand dollars; and the Secretary of War may make a survey and estimate the cost of such waterway or canal with one lock, with a view to the construction of the same, in conjunction with the county authorities of King County, or other agency, of sufficient size to accommodate the largest commercial or naval vessels afloat; or, if deemed more advisable, with a view to the construction of a canal of less dimensions, and to submit dimensions and estimate of cost of same, together with a report upon what portion of said work will be done or contribution to be made by said county or other agency. And the provisions of the act approved June eleventh, nineteen hundred and six, authorizing James A. Moore, or his assigns, to construct a canal, with suitable timber lock, are hereby so modified as to permit the said James A. Moore, or his assigns, subject to the conditions and stipulations of the act, to excavate a channel seventy-five feet wide at the bottom and twenty-five feet deep at mean low water from deep water in Puget Sound at the mouth of Salmon Bay to deep water in Lake Washington, in lieu of constructing the canal and timber lock specified in the said act, the location of the said channel and work of excavation to be subject to the direction of the Secretary of War, and the plans and order of work to be subject to his approval before beginning and when completed and accepted by the Secretary of War, the channel to be and remain a free public waterway of the United States."

In 1907 (Laws 1907, page 498, ch. 216; Rem. & Bal. Code, § 6865 *et seq.*), the state legislature passed an act entitled:

"An act granting to the United States of America a right of way for Lake Washington canal in King county, through lands and shore lands belonging to the state of Washington or the University of Washington, and declaring an emergency."

The foregoing appears to be all the legislation, other than the act here under consideration, upon the subject up to the time of the action of the board of county commissioners had in September, 1908, except that the state legislature has passed an act authorizing the bonding of counties for said purposes, which was held unconstitutional by this court. In all this legislation we fail to find any act or declaration by the national government which discloses any intention or proposal on the part of the government to construct or operate this canal, now, or within a reasonable time in the future, or at all. It is true that, in the year 1894, an appropriation was made for the improvement of the waterway connecting Puget Sound with Lakes Union and Washington, by enlarging said waterway into a ship canal; provided the entire right of way was secured to the United States free of cost. Subsequently the entire right of way was, in 1899, conveyed to the United States, but no money is shown to have been appropriated or used in the improvement of this waterway, except in "Shilshole Bay through Salmon Bay to the wharves of Ballard," which waters are a part of Puget Sound, and the improvement of these waters is conceded to be a proper government improvement even though the ship canal into Lakes Union and Washington should never be constructed. Since the right of way was deeded to the government more than ten years ago, each appropriation of money to be used in the vicinity of said canal, or which might be used upon the improvement thereof since that time, has contained substantially this provision "Nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget Sound with Lakes Union and Washington"; thus

showing that the government is neither proposing nor intending to construct or operate the canal. The only act tending to show such intention is the acceptance of the right of the right of way, but the effect of this acceptance, as showing an intention or proposal to construct the canal, is materially lessened by lapse of time and by inactivity, if it is not entirely destroyed by the declaration in acts appropriating money since that time, that "nothing herein shall be construed as the adoption of any project for the construction of the waterway connecting Puget Sound with Lakes Union and Washington." It is argued by respondent that the projects there referred to are different proposed locations of the canal, but it seems clear to us that the object of the declaration was to avoid any inferences that the government intended to construct the canal, or to ratify any act done from which it might be inferred that the government intended or proposed to construct the canal.

It is manifest from the record that the people of King county have expended much money upon the enterprise, and have earnestly labored to induce the government to undertake the work; but it is also apparent from the acts of Congress above referred to that, while the government has placed no obstacle in the way of the work by King county or private citizens, it has manifested no intention to construct or operate the canal within a reasonable time. The county commissioners were, therefore, without authority under the act of 1907 to create the assessment district, or to levy a special assessment in aid of the canal.

The judgment of the lower court must therefore be reversed and the cause dismissed. It is so ordered.

Rudkin, C. J., Parker, Dunbar, and Chadwick, JJ., concur.

Gose, J. (dissenting)—In view of the public nature of the question at issue, I feel constrained to briefly state my reasons for dissenting. The facts recited in the majority

opinion disclose, that the Federal government has appropriated $480,000 for "improving the waterway connecting Puget Sound with Lakes Union and Washington"; that in 1899, it accepted a deed from King county, investing it with the title to a right of way for the canal, and that it has since that date accepted from the state a grant of the right to construct and operate the canal over any state land in King county; that prior to receiving these grants from the state and county, the appropriation of 1894 was made, on the condition that no part of it should be expended "on the improvement of the waterway connecting Puget Sound with Lakes Union and Washington, until the entire right of way and a release of all liability to adjacent property owners has been secured to the United States free from cost"; that in 1906, Congress passed an act giving authority to James A. Moore to construct a ship canal "along the government right of way connecting the waters of Puget Sound . . . with Lake Washington." It will be observed that the Federal government has held title to the right of way granted to it by King county for about eleven years, and to the privileges granted by the state for nine years, and that during this period it has from time to time made appropriations for the canal. I do not regard the statement that "nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget Sound with Lakes Union and Washington," as militating against the view that the government is intending or proposing the construction of the canal. I think the meaning of this clause is, that the government is left free and untrammeled to adopt such location or route, or the one or two lock system, as its interests may require.

It is stated by the majority that the effect of the acceptance of the right of way as indicative of the intention of the government is materially lessened "by lapse of time and inactivity." It must be admitted that the government has not proceeded with the celerity desired by the people of the

state. The fact remains, however, that it continues to hold and assert title to property of great value, and that it continues to appropriate funds for the execution of the enterprise. Moreover, we are advised by the press dispatches that a considerable appropriation will probably be made at this session of the Congress. I think that the precise contingency contemplated by the legislature exists, and that the recited facts irresistibly lead to the conclusion that the government is intending and proposing the construction of the canal. If the legislature had intended that the proposal should be expressed in words, or that a fixed amount should be appropriated before the levy of a local assessment, it would no doubt have said so in plain terms.

In view of the fact that the second and third grounds relied upon for a reversal of the judgment are not discussed in the majority opinion, I will not comment upon them further than to say that I do not think they offer any obstacle to the relief granted by the trial court. The respondent only asks that the appellants proceed to equalize the assessment so that the project which they initiated may continue to completion. The appellants have already adjudged that the improvement was for the general welfare. Under a similar act, King county appropriated the private property of its citizens, levied and collected a tax of $255,642, for the purpose of paying for such property, and then, as we have seen, conveyed the property to the Federal government. Neither the county nor its officers should now be heard to assert that the acquisition of this property, or the collection of the tax, was illegal. The act under which the county appropriated the property was held constitutional in *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

As I view the question, the good faith of the county and the Federal government alike are pledged to the construction of the canal. I therefore dissent.

Crow and Fullerton, JJ., concur with Gose, J.

[No. 8720. Department One. May 31, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH WARE, *Appellant*.[1]

JURY—COMPETENCY—OPINIONS—PRESUMPTION OF INNOCENCE. A juror is not disqualified by the opinion that, when a homicide is admitted by the accused, it will be presumed that he was guilty of a crime until evidence of justification is submitted; and this does not conflict with the rule that the juror must, in proper cases, accord the accused the presumption of innocence (Chadwick, J., dissenting).

CRIMINAL LAW—INSTRUCTIONS—COMMENT ON EVIDENCE—WITHDRAWING ISSUE FROM JURY. Where the accused admitted committing a homicide, following a dispute relative to articles of property alleged by the deceased to have been stolen by the accused's son, it is not an unlawful comment on the evidence for the court to withdraw from the consideration of the jury the merits or demerits of the controversy over the articles, as having nothing to do with the issue of self-defense, which was the only issue.

CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. The savings clause in the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing in this act shall apply to an offense committed before the day when this act shall take effect and that such offense shall be punished under existing laws as if this act had not been passed, is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 11, 1909, upon a trial and conviction of manslaughter. Affirmed.

Gus L. Thacker and *Hayden & Langhorne*, for appellant.

J. R. Buxton and *W. E. Bishop*, for respondent.

GOSE, J.—The appellant was tried upon a charge of murder in the first degree, found guilty of manslaughter, and has appealed from the judgment entered upon the verdict. The appellant's first contention is that the court erred in denying his challenge to juror W. C. Stocking. It was admitted, both during the examination of the juror on his *voir dire*,

[1]Reported in 109 Pac. 359.

and throughout the trial of the case, that the appellant had shot and killed the deceased, but it was asserted that he did so in self-defense. The juror was examined and cross-examined at length, but the substance of his answers is that he had read "something" of the account of the killing in a newspaper; had heard it discussed "a little" by one of his neighbors; that from what he had heard and read he formed no opinion as to the guilt or innocence of the appellant "that would be permanent;" that it was his opinion that, if a person takes a life, he has committed a crime, unless the circumstances justified the killing; that he had no opinion as to whether any justification existed in this case; that if the evidence should disclose that the appellant was justified in killing the deceased, he would give him the benefit of that defense; that he had no prejudice against the appellant, and entertained no opinion that would prevent him from giving him a fair and impartial trial according to the law and the evidence, and that he would take the law of the case from the court. More briefly expressed, the juror's view was that, where the killing is admitted, a crime is presumed until some evidence of justification has been submitted. In this respect his view of the case was in harmony with the law. Speaking upon the identical question, in *State v. Payne*, 10 Wash. 545, 39 Pac. 157, at page 553, this court said:

"If he kills another he must, in the absence of a showing to the contrary, be presumed to have intended to kill him. And while it is true that even although he did intend to kill he may not be guilty of murder, or of any other crime, yet if he is not, it is by reason of some fact in justification of his action, the burden of proving which public policy demands should be cast upon him. . . . The proper instruction is that the presumption will have force unless there is something in the case to rebut it."

This view was adhered to in *State v. Clark*, *ante* p. 128, 107 Pac. 1047:

"The rule as generally stated is, that when the killing is shown, and self-defense is pleaded, it is incumbent upon the

accused to establish this defense, unless it is shown by the evidence offered by the prosecution to establish the killing." 21 Cyc. 883.

The same view is expressed in *State v. Cephus*, 6 Pen. (Del.) 160, 67 Atl. 150; *State v. Moss*, 77 S. C. 391, 57 S. E. 1098, and *State v. Peterson*, 149 N. C. 533, 63 S. E. 87.

The fact that a juror had formed or expressed an opinion that the defendant shot and killed the deceased did not disqualify him as a juror where the killing was conceded and self-defense claimed. *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970; *State v. Everett*, 62 Kan. 275, 62 Pac. 657; *Tubb v. State*, 55 Tex. Cr. 606, 117 S. W. 858. The same general principle is announced in *State v. Boyce*, 24 Wash. 514, 64 Pac. 719. Indeed, we cannot conceive how a frank juror, who carefully weighed his words, could have answered differently. As we have seen, when one has taken a human life, the law does not presume that the homicide was justifiable, but presumes the contrary. We are not aware of any principle of law which requires the juror to accord a greater presumption of innocence to a defendant than the law accords him in the particular case. The learned trial court instructed "that where homicide is proven, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of the crime, and if the defendant would reduce it to manslaughter the burden is on him." It is not argued in the briefs, nor was it claimed at the bar, that this instruction is erroneous; and as we have seen, such claim would not be tenable. This rule is not in conflict with the general rule that a juror must, in all proper cases, accord to the defendant the presumption of innocence, as announced in *Rose v. State*, 2 Wash. 310, 26 Pac. 264; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Murphy*, 9 Wash. 204, 37 Pac. 420; *State v. Wilcox*, 11 Wash. 215, 39 Pac. 368; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30; *State v. Moody*, 18 Wash. 165, 51 Pac. 356, and *State v. Riley*, 36 Wash. 441, 78 Pac. 1001. Where the law

presumes innocence, the jury must indulge the same presumption; but where, upon the admitted facts, the law presumes that a crime has been committed, a juror is not incompetent for indulging a like presumption.

The evidence shows that the appellant had lost certain articles of personal property, which were found in the possession of a son of the deceased, a child ten years of age, which he claimed to have found, but which the appellant believed he had stolen. Relative to this property, the court instructed:

"Before proceeding to instruct you upon this issue of self-defense, I will try to simplify this issue to some extent by eliminating such other considerations and matters as do not have anything to do with the issue of self-defense; and, first, I instruct you that the merits or demerits of the controversy over articles of property have nothing to do with this question."

The appellant's second contention is that this instruction is a comment on the facts and violative of section 16, art. 4, of the constitution. We do not so read it. It was the right and duty of the court to withdraw immaterial testimony from the consideration of the jury. In effect, that was what the court did by this instruction. As we have observed, the appellant admitted that he shot and killed the deceased, but claimed that the deceased, following a conversation about the property, suddenly became enraged, said to the appellant: "I will cut your heart out for calling my boy a thief," and was in pursuit of him when he fired the fatal shot. It is apparent that it was wholly immaterial whether the boy had found or stolen the property. The only question for the jury to determine was, whether the appellant was in such actual or apparent peril when he fired the fatal shot that the law would justify the killing as an act of self-defense. Upon this question the jury was fully and correctly instructed. This was the only issue.

The deceased was killed on May 25, 1909, and the trial occurred in September following. At that time the new

criminal code was in force. The third and last point urged is that the court erred in overruling the demurrer to the information. The precise point pressed is that the new law, which took effect June 8, 1909, repealed the old law in respect to murder in the first degree, Rem. & Bal. Code, § 2726, and that there is no proper saving clause in the new law or elsewhere. We have heretofore held adversely to this contention. *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388; *State v. Newcomb*, *ante* p. 414, 109 Pac. 355.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., FULLERTON, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting)—The rule that, when a killing is shown the law will presume that it is murder in the second degree, and the burden is upon the state to raise it to murder in the first degree, and upon the defendant to reduce it to a lower degree, or show that the killing was justifiable was, so far as I am able to find, first announced in *Hill's Case*, 2 Gratt. (Va.) 594. The rule, I believe, was unknown to the common law, but is now established in this country. It seems to have grown up in applying, or possibly misapplying, the common law rule that malice will be presumed from the fact of killing (2 Blackstone, Commentaries 201) but without its qualifications. The vice of the majority opinion lies not in the presumption, but in applying it to the examination of a juror upon his *voir dire*. That the rule should not be taken without proper qualifications or applied in any case to the examination of a juror, seems to me to be too plain for argument. Where the killing is admitted, as in this case, and the plea of justification is set up, and where the state will be put to no proof whatever so far as the killing is concerned, there can be no reason for the application of the rule. The presumption of crime attaching to the killing of a human being is an extremely delicate instrument in the machinery of justice. It should never be left to operate alone. Alone, it might work a denial of justice. But when applied under the

direction of the court, with proper caution, at the proper time, and with reference to other safeguarding principles of the law, it may be salutary. Justice, if it be justice, must be even handed. The scale must balance. If we are to put in the hand of the juror upon his *voir dire* the sword of the prosecution, we should insist that he also carry the shield of the defense—the presumption of innocence. Unless from his whole examination his mind shows this balance, he should be rejected.

In the case at bar the juror said that he was of the opinion that "if a person takes a life, he has committed a crime. Still there may be circumstances that would justify it." "I believe that any person who takes a life has committed a crime." "I think that any person who takes the life of another has committed a crime." In answer to the question: "You have an opinion that, because Ware shot and killed Corp, that he committed a crime?" he replied: "Yes, sir." "And you have that opinion with you now? A. Yes, sir." "There is no dispute but what Mr. Ware shot Mr. Corp. Assuming that to be true, then you have an opinion that he committed a crime by reason of the killing? A. Yes, sir." The juror said that he believed in the presumption of innocence, and in answer to the question: "How can you believe all that when you say that you believe a crime has been committed here?" replied: "I would give him a chance to prove himself." He further says that he was "open to conviction." Further said that he would enter upon the trial believing that a crime had been committed by the defendant. The juror has said, in legal effect: "I believe the defendant guilty and will believe him guilty until he has proved his innocence, or (to use the juror's words) has 'proved himself.' " The word "crime" has no uncertain meaning. Crimes, offenses, criminal offenses and public offenses, are synonymous. 2 Words & Phrases, p. 1736. They mean such violation of the law as will subject the offender to its pains and penalties. The juror had not been advised, and, in my judgment, it would have been improper for the court at

that time to have advised him that, when a killing is shown, the presumption that it is murder in the second degree follows. That is a rule designed to aid in extracting the truth from the testimony, and not to aid the court in the selection of jurors. Nor is there anything in the record to show that the juror indulged in such presumption, or had in mind the second degree of murder at all. Indeed, if this court is to presume anything in favor of the juror, we should presume that, when he says he believed, and would believe until he was convinced to the contrary, that a crime had been committed, he had in mind the crime of which the defendant stood charged —that is, murder in the first degree; and that, if he had not been possessed of that conviction, defendant might have been acquitted, or found guilty in some lesser degree than that returned by the jury.

It might be that some merit would attach to the argument of the majority had defendant been subject to one of two verdicts, guilty, or not guilty. But when we remember the included crimes to which the presumption relied upon does not attach, I cannot but feel that one of the first principles of the law—that a man shall be entitled to a fair trial at the hands of an impartial and unbiased jury—has been wrenched from its moorings. The cases cited by Judge Gose to the effect that, where a juror has formed or expressed an opinion that the defendant "shot and killed" the deceased, he is not disqualified, even though self-defense is claimed, do not touch the case we have before us. In the *O'Shea* case the court says that

"It appears upon further examination that the opinions so formed did not extend beyond the fact that O'Shea had fired the fatal shots. The fact that Dawson was shot by O'Shea, and that death resulted from the shooting, was not disputed. . . . Opinions upon matters not in issue do not disqualify the jurors entertaining them, and especially where, as in this case, it was shown that they had not formed or expressed an opinion as to the *guilt* or innocence of the defendant."

The case of *Everett*, quoting from the syllabus prepared by the court, says: " A juror is not disqualified to sit by reason of having formed or expressed an opinion upon matters involved in the case over which there is no dispute." In the *Tubb* case, it was said there was "no issue made or denial interposed that he killed the deceased; nor was there any semblance of justification under the law of self-defense or otherwise; and that the juror had formed no opinion upon the only issuable fact in the case was unquestioned." In that case the only issuable fact was insanity; whereas, in this case, there was a distinct issue, not only that there was no crime committed, but further, that the act was done in self-defense.

We have accepted this juror upon the theory that he has a right to go into the jury box with a belief that the killing was deliberate and malicious, beliefs which would not follow opinions formed or expressed upon nonissuable facts. Every accused person is entitled to a fair and unbiased jury, and it is time enough to base presumptions as to the minds of jurors upon the technical legal rule that the slayer of a human being is guilty of murder in the second degree, when the testimony is all in and can be explained to the juror and its relation to other rules of law made plain. In the administration of the law certain arbitrary rules have been found to be necessary, but over all there is a justice common to all humanity. It has found expression in that universal demand that a juror shall come to the trial of a cause with a mind free to consider not one rule of law, but all the law given him by the court—not one fact, but all the facts as they come from the lips of the witnesses. If, as is possible under the juror's answers, he deemed the defendant guilty of the crime of manslaughter, of which he was convicted, it can hardly be contended that he was a juror within these rules, or that the law invoked by the majority is applicable.

The challenge to the juror was overruled, and thereafter an admitted challenge to another juror was overruled. The

defendant was compelled to challenge the second juror. This exhausted his peremptories, and he was forced to go to trial with the juror Stocking who, in my judgment, had clearly disqualified himself.

I believe that the juror should have been rejected under the authority of *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *State v. Lattin*, 19 Wash. 57, 52 Pac. 314, and *State v. Riley*, 36 Wash. 441, 78 Pac. 1001. In those cases it was held that one who had such an opinion as to the guilt or innocence of the accused as would require evidence to remove, was subject to challenge for actual bias. As was said by Judge Dunbar in the *Moody* case:

"The answers of the juror in this case plainly show that the impression, as he terms it, which he had formed, really amounted to a conviction, and a fixed and stable opinion in regard to the guilt or innocence of the defendant, for he stated that his mind was convinced as to the guilt or innocence of the defendant, and frankly confessed that it would take testimony to remove the impression which had been made upon his mind by what he had heard."

These cases, and those following them, should have been expressly overruled, for there can be no difference in the mind of one who is possessed of an opinion which would require evidence to remove, and one who believes the accused has committed a "crime," a belief which he frankly admits he will entertain until the defendant has "proved himself." The premises are identical, and the same legal conclusion should follow.

Furthermore, the juror should have been rejected on general grounds; for experience has taught us that one who will qualify himself when under examination by the state, and as readily disqualify himself when under examination by the defendant, and will do either as the court may lead him, does not disclose that steadiness of mind that a juror who sits in judgment upon the life or liberty of another should possess.

[No. 8580. Department One. May 31, 1910.]

S. K. Bowes *et al.*, *Appellants*, v. The City of Aberdeen *et al.*, *Respondents*.[1]

Eminent Domain—"Taking or Damaging" Property—Judicial Question. What is, or is not, a taking or damaging of private property is a judicial question, and the courts are not bound by a legislative declaration to the effect that the filling of low lands shall not be considered a taking or damaging within the constitutional meaning of those terms.

Municipal Corporations—Improvements—Filling Low Lands—Police Power—Health. A city may, by virtue of the police power, in a proper case, and when necessary to the public welfare, irrespective of the right of eminent domain, fill in low lands that are unsanitary and a menace to health, without rendering compensation for damages claimed to private property filled in; and under Rem. & Bal. Code, § 7975, may assess the property to pay the cost of the work, providing the exercise of the power is not unjust or arbitrary.

Same—Necessity for Improvement—Evidence—Sufficiency. A necessity exists, authorizing the exercise of the police power by a city for the purpose of filling low lands, and the improvement is not disproportionate to the danger, where it appears that an area covering one thousand city lots, within or adjacent to the business portion of a city where permanent streets are necessary, are so low and covered with stagnant water as to be unsanitary and a serious menace to the health of the city, and that the danger can be removed by filling in the land, and by no other practical or economical method.

Same—Determination—Judicial Question. Whether the facts warrant the exercise of the police power for the purpose of filling low lands in a city is a judicial question to be resolved by the courts.

Same—Statutes—Title and Subject of Act. The title of the act of 1909, empowering cities "to fill low lands . . . and for that purpose to exercise the right of eminent domain for the taking or damaging of property" is sufficiently broad to authorize the filling of low land under the police power as a sanitary measure without making compensation for damages claimed to the property filled in; since the reference to the right of eminent domain applies to property taken or destroyed and not to land filled in, and the power "to fill" includes the right to exercise the police power.

[1]Reported in 109 Pac. 369.

SAME — SPECIAL ASSESSMENTS — ACCORDING TO AREA — VALIDITY. An assessment upon the property to pay for the cost of filling low lands "in proportion to the surface area", as authorized by Rem. & Bal. Code, § 7975, is not unreasonable or arbitrary, because not made according to benefits or in proportion to the value of the property; nor is the same void as authorizing unequal taxation, in violation of the constitution requiring property to be taxed according to its value, as that clause of the constitution does not apply to special assessments.

SAME—CONSTITUTIONAL LAW—DUE PROCESS—STATUTES. The act of 1909 empowering a city to fill low lands and assess the cost upon the lands filled in in proportion to the surface area, is not a deprivation of property without due process; since it provides for notice and a hearing and authorizes the board to make alterations and modifications in the assessment as justice and equity may require.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 29, 1909, dismissing an action to enjoin a city from the prosecution of a public improvement, after a trial on the merits before the court without a jury. Affirmed.

J. B. Bridges, for appellants.

A. M. Wade and *Theo. B. Bruener*, for respondents.

CHADWICK, J.—The city of Aberdeen, a rapidly growing city of approximately twenty thousand inhabitants, is situated on the Chehalis river at or near its junction with Grays Harbor, an inlet of the sea. Bordering the stream there is a wide flat or tidal marsh, intersected by sloughs, through which the tide and flood waters and storm drainage from the hills have been accustomed to flow. At certain times of the year and upon certain tides, the water stands over the whole flat to a depth of from three to four feet, while at all times the ground water stands a few inches beneath the surface of the sloughs. The business part of the city, as well as a part of the residence district, is built upon these tide flats. The business of the city and the comfort and convenience of the

citizens demand that the grade of the streets be raised so as to bring them above the level of the high tides. Up to this time is has been possible, as well as feasible, to make elevated plank streets or roadways and sidewalks, but the increasing price of lumber, its lack of durability, and other reasons make it necessary to improve the streets in some permanent manner. It is possible to do this in one of two ways; to grade or fill the streets and alleys up to the required level, or fill the whole district, including the lots and blocks. To accomplish the first plan would require the erection of banks or retaining walls along the street lines, with openings left thereunder for drainage. To carry out this plan would cost approximately fifty cents a cubic yard. The other plan, being the one adopted by the city council, could be accomplished by hydraulicing the mud and silt from the harbor or river channels, or dirt from the adjacent hills, and would cost approximately eighteen cents per cubic yard. The answer of the city to the petition of the appellants recites the further condition as warranting the improvement in the manner contemplated:

"That the lands within the said improvement district have become and now are an important part of the city of Aberdeen, and is fast becoming of more importance as a part of the said city; that many houses, barns, out-buildings and other structures have been built upon the private property within the said district and many other like structures are being built thereon, and many more will be built thereon; that because of the low and swampy condition of said lands and because of the inability to drain the same and because of the stagnant waters standing thereupon, and because of the many dwellings, barns, stores and other structures located upon said lands, the said lands have become and are greatly detrimental to the public health and to the public welfare of the persons residing within the said district, and the city of Aberdeen generally, and that said condition is an unsanitary one and dangerous to the public health and welfare of the citizens of the said district and of all of the citizens of the said city of Aberdeen; . . . that to fill the said streets and alleys as

aforesaid without filling the said private property would leave all of the said private property low, wet and marshy ground, and would cause the same to be more unsanitary than the same now is without said streets and alleys being filled, and would cause the water to stand upon the said private lands throughout the year, even to a greater extent than the same now stands thereupon, and would cause the same to be very unsanitary and detrimental and dangerous to the public health and welfare of the said citizens; that it is necessary, for the purposes aforesaid, to fill the said streets and alleys and to fill the private property to the grade aforesaid; and that the public health and public welfare of the said citizens of the said district and of the said city of Aberdeen require that such filling be done; that the said public health and public welfare of the said citizens required the said grades to be re-established and raised because the old grade of the said streets and alleys was too low and did not, in any manner, provide for the drainage of the said district, the said grade as formerly established being a level one throughout the said district, and that for sanitary reasons and in order to keep the water from standing upon the said streets and private property, and in order that the same might be drained, it was necessary that the said grade of the said streets and alleys be raised as described in the complaint herein; that the public health and public welfare required and requires the raising of the grade of the said streets and alleys aforesaid and the filling of the said streets and alleys as aforesaid, and the filling of the said lots as described in the petition herein."

While it is provided, in section 5 of the act of 1909, chapter 147, page 572 (Rem. & Bal. Code, § 7975), under which the city is probably proceeding, that the filling of unimproved and uncultivated low lands of the character described in the answer and in the ordinance declaring the intention of the city shall not be considered a taking or damaging within the constitutional meaning of these terms, the city in its answer disclaims any intention or purpose to condemn the right to fill the lots and blocks belonging to private owners. We are of the opinion that the constitutional question thus raised may be safely disregarded, for if the city can fill the property

of a private owner under the act of 1909 or the act of 1907, Laws 1907, §§ 53-56, page 657 (Rem. & Bal. Code, §§ 7636-7639), in the manner contemplated, it must be done under the exercise of its police power, and not because the legislature has undertaken to say what shall be, or rather what shall not be, a taking or damaging of property. This is a judicial question, and were we inclined to pursue it further, we would not, as at present advised, feel bound by the declaration of the legislature. The regularity of all antecedent proceedings on the part of the council is not challenged by plaintiffs, so that the case is squarely before the court upon the question whether, under the facts as we have outlined them, a city can, in the exercise of its police power, fill the property of a protesting landowner so as to make a present condition sanitary, or anticipate a condition which is reasonably certain to follow the ordinary growth of a thrifty city.

While the evidence is conflicting, in the sense that a witness testified that present conditions were not unsanitary, the weight of the evidence is overwhelmingly in favor of the city's contention. Mr. Benn, the mayor, who has been a resident of the city since the first house was erected, says the conditions are unsanitary, and attributes present and possible conditions to the natural growth of the city and the stoppage of the natural ditches and drains, resulting from ordinary use. The health officer of the city testifies that there has been a greater mortality, especially among children living upon or over the tidal marshes, than upon the hill districts, and attributes the fact to the pollution of the soil consequent upon human habitation without proper drainage. Mr. Ewart, the city engineer, whose description of the physical conditions is accepted by the petitioners, and whom we therefore conclude to be skilled in his profession, says:

"Q. What effect does the levelness of this land have upon the drainage and sewerage? A. To put a sewer system on the level of this ground is impracticable. They are too flat.

The sewer pipe would have to be laid on a gradual slope of the river, and it would make them above the level of the lots in the district proposed to be filled. Q. In the proposed fill, Mr. Ewart, are these lands to be leveled more on the back side? A. They will have an incline of six inches to the block from the hill to the river; that is the least practical fall you can make on the streets. . . . Q. Do you consider, Mr. Ewart, you have heard the testimony as to the sanitary conditions in this district, do you consider that the land within this district or that this district as it stands is unsanitary? A. Very. Q. Will you give your reasons why? A. The presence of human beings tends to make it unsanitary. The offal from the table, from the animal excrement, is bound to accumulate more or less in this soggy ground, and makes it unsanitary. Q. Your idea then would be that the more people live in that district, the more unsanitary it would be? A. Yes, sir. Q. Do you consider this property was unsanitary in its original condition? A. It was by itself. Of course, if there was nobody there, no one would be likely to get sick. Q. To make as favorable illustration as you can, suppose there was no one living but one man in that district? A. Outside the dampness it would not be unsanitary. Q. Would the dampness be unsanitary? A. It is, yes. A great many people suffer from cold and on account of dampness. Q. You have never known of any plague or great amount of sickness on account of this condition, have you, in the city of Aberdeen or Hoquiam and that neighborhood? A. Yes. Q. You think that there is more sickness from the people living on the more level ground than on the high ground or hill district? A. This particular place has not been settled thick enough to cause that condition yet, but where it is more thickly settled, it is, yes. Q. Then your idea boiled down amounts to this, that in its original condition, when the tide came and went, and the sloughs were not interfered with, it was simply unsanitary, but that it would become more unsanitary as the district became more populated? A. Yes, sir. Q. And that it would become more unsanitary than it is now? A. Yes, sir. . . . Q. I want to get at your idea as to the necessity of filling this property, because of sanitary conditions; as I understand you, you think it is necessary? A. I do. If you confine a few people in that district, and dike the district, and you allow no more people to go in there, and keep them absolutely clean, make them

keep their houses clean and their sewerage and garbage out of the way, you might have a sanitary district; but it is not practicable to do that. For instance, the district immediately west of this it is planned to dike, and the people living there are widely separated, and for the present that would answer, but if heavily populated, it would not be practicable or sanitary. Q. Is there not some way of making this land sanitary without so much expense and without filling it? A. I do not think so. You could make it more nearly sanitary by diking it, but we have the tide water from the river; and whenever you dam that out you also dam in the storm water, and all your water will be dammed in at the same time that your tide water is dammed out."

Plaintiffs asked for an order restraining the city from further prosecuting its design. After a trial upon the merits, the complaint was dismissed, and the plaintiffs have appealed.

But one assignment of error it made; that is, that the court erred in dismissing plaintiffs' complaint with prejudice. This is argued under two subdivisions, (1) that the ordinance is void, inasmuch as it takes and damages appellants' property without due process of law; (2) because the ordinance, as shown upon its face and by the testimony, is unreasonable and arbitrary. It is admitted that "the property owner has not an absolute control over his property, but that he holds it subject to the rights of the community at large, and that it is one of the conditions of his tenure that he hold or use his property so as not to injure others." But it is said that "the police power, except in cases of extreme emergencies or of imminent danger, cannot take from the property owner his property without paying full compensation therefor and without proving a public necessity for such taking." Just what the police power of a state or city may be is, as all of the authorities agree, or, at least, those following the *Slaughter-House Cases*, 83 U. S. 36, incapable of exact definition or limitation; for, as was most pertinently said in *Stone v. Mississippi*, 101 U. S. 814, "it is always easier to determine whether a particular case comes within the general

scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate."

Incapability of definition, however, does not destroy the right of the public to safeguard property, insure the general health, protect the morals, preserve the peace, or compel the use of property consistent with surrounding conditions by the exercise of arbitrary power and in disregard of the primary right of the individual. A subject when measured by other conditions may warrant its exercise; whereas, if the relative condition be lacking, the power will be denied. Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written constitutions. Although the fundamental truths must from their very nature remain unchanged, the right of property is a legal right and not a natural right, and it must be measured always by reference to the rights of others and of the public. Neither an individual nor the public has the right to take the property of another and put it to a private use. But it would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community. These are the principal grounds upon which the right to exercise the police power rests, and the only question confronting us is whether the present attempt comes within these recognized principles. Freund, in his work on Police Power, § 143, says:

"The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? it is possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of the legislature?"

The first test proposed—does the danger exist—may be almost summarily disposed of. Although we are not prepared to indorse the rule, asserted by some case writers, that a court will be bound by a legislative direction to that effect, we are not put to a consideration of that question in this case. The evidence, as we have shown, abundantly sustains the declaration of the city council that the land proposed to be filled is unsanitary, and is or may become a menace to the public health. That it is of sufficient magnitude and concerns the whole public in so far as the municipality is concerned, is likewise shown. The area to be filled covers approximately one thousand city lots, with adjoining streets and alleys. These are located partly within and partly adjoining the business portion of the city, where permanent streets are necessary and where undrained land would jeopardize health and retard the growth of the city. So, too, the proposed improvement will remove the danger, leaving the area affected above the higher waters at flood tides or storm periods, and insure perfect drainage as well as an entire absence of stagnant water. The proposed improvement is not disproportionate to the danger, for it is shown that, if the danger is removed at all, it cannot be done in any other practical or economical way.

The remaining tests require more extended argument, and may be discussed together. They are covered by the appellants' objection that the exercise of the power asserted in this case is unjust and arbitrary. Appellants base their contentions primarily upon the statement in Lewis on Eminent Domain (2d ed.), vol. 1, page 473:

"The police power, so far as it relates to property, is a power to regulate its use, and is negative or inhibitory in its character. A man cannot be compelled, under the police power, to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public. This is the beginning and the end of the police power over private property. No instance can be cited, out-

side of the mill and drainage acts (which are in controversy), in which the owner of private property has been compelled to devote it, or submit to its devotion, to a particular use, by virtue of the police power, or of any other power except that of eminent domain."

The true rule is also found in 10 Am. & Eng. Ency. Law (2d ed.), page 223:

"To effect the drainage of large tracts of land and thereby make them fit for habitation and use is a purpose sufficiently public to justify the exercise of the right of eminent domain."

To say that the police power can only be exercised in given cases, and then call a halt, would be to fix a limitation which, from the very nature of the power itself, cannot be done.

It is asserted, however, that, if the case falls within the drainage cases, this court has expressly held that the right to proceed thereunder cannot be sustained by reference to the police power, but must be carried out under the law of eminent domain, and the following decisions of this court are cited and relied upon: *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652. The *Askam* case was properly decided. In that case suit was prosecuted by one over whose land it was proposed to run a ditch for the purpose of draining the lands of others. He was not in fault, nor was he using his property to the detriment of the public. As was said by the writer of the opinion:

"Even if we concede that the requirements of the law are such that the board of county commissioners must decide that the swamps to be drained are a nuisance, before they will proceed in the matter, yet the intention does not appear in the act to declare the nuisance to be of such imminent danger to the public welfare as to require private property of others than those maintaining the nuisance to be taken without compensation."

While the other cases relied upon affirm correct principles of the law, they were, in the opinion of the writer, considering

the facts of each particular case, improperly decided. At any rate, in the light of subsequent decisions of this court, they should not be considered authority in this case. The difference between one whose land is taken or damaged in the aid of a public improvement and one whose land is actually improved was noticed in *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779. In *Wurts v. Hoagland*, 114 U. S. 606, the reasoning of Chancellor Zabriskie, in *Coster v. Tide Water Co.* (18 N. J. Eq. 54, 68), is adopted as a correct statement of the law:

"The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them, farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the constitution."

That the legislature has the right to assert its police power in this regard cannot now be questioned. Cooley, Constitutional Limitations (7th ed.), page 868; Cooley, Taxation (2d ed.), 617; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112; *Hagar v. Reclamation District*, 111 U. S. 701; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9. It would unnecessarily and unreasonably extend the limit of this opinion to notice the long line of cases where the state courts have construed this power. But whether the facts of the particular case warrant the assertion of the power is a judicial question, to be resolved by the courts. Freund, Police Power, § 142.

"It is sometimes difficult to draw a precise line of distinc-

tion between the public and private objects of improvements of the nature under consideration here. It is true, the owner of land may use it and cultivate it as he desires, so long as he does not injuriously affect the rights of others. But the public also has an interest beyond that of the mere sanitary condition of the land, and founded upon other and different principles than the controlling or abatement of nuisances, where any considerable number of persons are concerned, or tract of land is useless, and improvements may be made commensurate to the benefits received, and the land itself may be taxed for said benefits. The principle requires careful application, but many illustrations of its existence can be found sustained by the highest authority." *Lewis County v. Gordon, supra,* page 90.

It will thus be seen that the conflict of authority upon the right to exercise the police power or to proceed by eminent domain is apparent rather than real. Both rules exist, but their application, as Judge Reavis has said in the *Lewis County* case, requires careful application, and must be made to depend in every case upon the subject of the particular action when measured by the public interest. Resting upon the principle that it is the duty of a landowner to so keep his property that no menace to the public health shall come therefrom, courts have held that a city could, under its police power, fill up low lying lands and recover the cost thereof. *Charleston v. Werner,* 38 S. C. 488, 17 S. E. 33, 37 Am. St. 776; *Rochester v. Simpson,* 134 N. Y. 414, 31 N. E. 871; *Nickerson v. Boston,* 131 Mass. 306.

It is also urged that the title of the act of 1909—"An act empowering cities of the second and third class to fill low lands within their borders and for that purpose to exercise the right of eminent domain for the taking and damaging of property and providing a method for making compensation therefor and providing for levying and collection of special assessments on the property benefited and declaring an emergency"—is insufficient to warrant an exercise of the police power. Although the city probably has the right to exercise its police power in all proper cases as an incident to

its general governmental powers, or under the general welfare clause of its charter, we nevertheless believe the title to be sufficient. The employment of the words "to exercise the right of eminent domain" can be held to apply only to such property or improvements as may be actually taken or destroyed, and not to the filling of the land itself, which is in no sense taken, but is left to the free use of the owner. Section 3 of the act makes this plain. The purpose need not be expressed in words; the power to fill is sufficiently broad to include any reason recognized by the law for the exercise of the power. It was said in *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, 77 Am. St. 269, 47 L. R. A. 52, with some hesitation, though why is not made clear to us, that:

"When it is clearly perceived from the terms of an act that the thing prohibited necessarily affects the public health, it may not be necessary expressly to declare therein what the object of the act is; . . ."

If the title advises the citizen that the subject of the act is to fill low lands, and gives notice of a procedure, it is enough, and will be sustained so long as the right can be rested on any recognized principle, although the "purposes" be not stated in terms. *Lien v. Board of Comr's of Norman County*, 80 Minn. 58, 82 N. W. 1094.

Finally, it is urged that the plan of assessment—that is that "the several parcels of land located in the improvement district to be assessed for such improvement shall be assessed according to and in proportion to the surface area, one square foot of surface to be the unit of assessment" (Laws 1909, page 572, § 5; Rem. & Bal. Code, § 7975), would deprive the owner of his property without due process of law. It is said that it would be manifestly unreasonable and arbitrary to assess the property of one who may have a lot worth only $750 the same amount as one whose lot is worth $5,000, or one whose lot is filled only three feet deep the same as one whose lot is filled five or six feet. No system of

taxation or assessment is fair and equal in the abstract. We can only approximate equality. The right to assess the cost of improvements by area in this class of cases has been sustained by the highest authority. *Parsons v. District of Columbia*, 170 U. S. 45; *Bauman v. Ross*, 167 U. S. 548; *French v. Barber Asphalt Co.*, 181 U. S. 324. The right to assess by area has been most frequently upheld in the drainage and levee cases coming out of the southern states, although it is affirmed in most all of the states, the courts holding that the provision of the constitution which requires all property to be taxed according to its value is applicable only to taxation in its ordinary and received sense, and not to local assessments where money is raised to be expended on the property taxed. In *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276, a tax not exceeding fifty cents per acre was upheld. The court said:

"The present case may be taken as an illustration, and will show the folly of judicial interference. The charter of the Levee Company requires the tax to be regulated by the number of acres and not their value. This, upon first impressions, might carry an appearance of injustice; but it is not very easy, from all the facts disclosed in the record of this case, to infer that any practical injustice whatever has been done. Lands in the neighborhood of Alexandria are rated at seventy-five dollars an acre, and, for aught that appears, were so rated before the company was organized. The lands of the complainants are only estimated at twenty dollars per acre. If the improvement increases the value of each class of lands *pari passu*, there is no injustice. If the levee or embankment and canals raise the price of Alexandria lands to seventy-five dollars per acre, and increase the value of the complainant's land, distant perhaps fifteen miles from Alexandria, to twenty-five dollars an acre, where is the hardship complained of? Where lands were unequal in value before the proposed adventure or improvement, it was surely not the purpose of the company to bring these lands to an equality of valuation. It was not contemplated that land worth twenty dollars an acre should be brought up to a hundred, at the same time that land worth previously seventy-five dollars an acre should be raised to one hundred

dollars per acre. This difference in value, if it arose from causes entirely independent of the overflow or its prevention, must of course still continue after the completion of the works. Neither party has a right to complain if the increase of value in each has been in the same proportion to the original value in both cases. Indeed it is quite apparent that a taxation upon value and not quantity would in the hypothesis stated produce great inequality. The burden would not be distributed in proportion to the benefit. How this may be in point of fact, we of course do not pretend to know; but there is nothing in the record to show that the facts may not be exactly as we have supposed."

To the same effect is *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557. The cases will be found in Cooley, Const. Lim. (7th ed.), p. 735; 25 Cyc. 201, and 25 Am. & Eng. Ency. Law (2d ed.), p. 1201.

Nor do we believe that appellants are in any way deprived of their property without due process of law, within the rule of *Davidson v. New Orleans*, 96 U. S. 97, and *Hagar v. Reclamation District*, 111 U. S. 701. If it be conceded that the legislative department has not the right to arbitrarily fix the amount of the tax, the act of 1909 is within that line of cases holding that, if the citizen be given an opportunity to be heard, either before the assessing body or in the courts, then the levy of such special assessments will not operate as a deprivation of rights of property without due process of law. The act in question provides for a hearing upon the assessments levied, and that at such time the board may hear, consider and determine objections and protests, and make "such alterations and modifications in the assessment roll as justice and equity may require."

It may be understood that we have not overlooked the point made by appellants that, but for an embankment made by a railroad operated along the water front under a franchise granted by the city council, the present improvement would not be necessary. There is evidence tending to show that the railroad grade is not responsible for present conditions; but, whether it is so or not, its removal would operate

to restore original conditions which are shown to be equally inconsistent with the present necessities of the public.

The judgment of the lower court is affirmed.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—The legislature of the state of Washington, at its 1909 session, passed an act relating to filling lands by cities of the second and third classes. Laws 1909, p. 569, ch. 147 (Rem. & Bal. Code, § 7971 *et seq.*). Section 1 of the act provides that whenever the city council of any such city shall deem it necessary or expedient on account of the public health, sanitation, the general welfare, or other cause, to fill or raise the grades or elevation of any marsh lands, swamp lands, tide lands, or lands commonly known as tide flats, or any other low lands situated within the limits of such city, and to clear and prepare said lands for such filling, such city council shall have power to do so, and to tax the cost thereof to the property benefited. Section 3 provides that, "The filling of unimproved and uncultivated low lands of the character mentioned in section 1 of this act, shall not be considered as damaging or taking of such lands." Section 4 provides for preparing plans and specifications of the improvement and for an estimate of the cost and expense thereof, in which shall be included "the cost of supervision and engineering, abstracter's fees, interest, and discounts and all other expenses incidental to said improvement." Section 5 provides for the making of an assessment roll, and further provides that the "entire amount of compensation . . . including all of the costs and expenses incidental to the condemnation proceedings, . . . with the entire cost and expense of making the improvement, may be assessed against the property within the district subject to assessment," and that "the several parcels of land located within said improvement district to be assessed for such improvement shall be assessed according to, and in proportion to, surface area, one square foot of sur-

face to be the unit of assessment." Further sections provide for condemning the improvements upon such property, and others relate to the procedure, the act containing elaborate provisions for carrying into effect the declared purposes.

Within the corporated limits of the city of Aberdeen and lying immediately west of its principal business section, is a large area of level land that was formerly marsh land, so situated that it is subject to the ebb and flow of the tide. In its natural state it was penetrated by sloughs, which admitted the tides and served as drains for seepage and surface waters. The surface of the land, while above the normal, was below the extreme tides, and would be covered entirely with water when these occurred. This caused no ill effects to the public health, however, as the drainage was complete and effectual. But with the advent of population came highways and railroads. These were constructed down the bank of the river across the mouths of the sloughs, partially damming them up, and while they have a tendency to cut off the inflow of the tides, they also cut off the outflow of the seepage and surface waters, thus causing the waters to accumulate in stagnant pools, menacing the health of the community. The tract in question is of considerable area, being triangular in shape, having a base of some 4,000 feet with an altitude of perhaps 3,200 feet. It was long since platted into lots, blocks, streets, and alleys as a part of the city of Aberdeen. The streets have been dedicated to public use, and the city early established grade lines over them. The lots number about one thousand, and are divided among a number of owners who hold in severalty; they range in value from $750 to $5,000, owing to location. A few business houses and a number of dwellings with their accompanying outhouses have been erected on lots within the district, but in the main they remain unimproved.

In the early summer of 1908, the city council conceived the idea of improving the above described district. To that end, on June 23, 1909, it passed an ordinance establishing

new grades over the entire tract, making them higher than the earlier established grades. On September 15, 1909, it adopted a resolution declaring it to be the intention of the city council to "clear, grub and fill up to the established grade . . . all of the lots, lands and parcels of lands, . . . and all of the streets, alleys and public places, on that portion of the townsite," of the city of Aberdeen above described, reciting that it appeared to the city council that it was to the best interests of public health, sanitation and general welfare of the inhabitants of the city of Aberdeen so to do; reciting further than it was necessary to condemn certain private property in order to make the improvement, but that the cost thereof, including the costs of making the improvement with incidental costs, would not exceed $330,000. On November 17, 1909, the city council passed an ordinance directing the improvement to be made. In the ordinance it directed the city attorney to bring all necessary suits to ascertain the amount of damages to be awarded for property taken or damaged by reason of making the improvement; it directed that the total cost and expense of making the improvement, "including the cost of making compensation for property taken or damaged, and including the cost of supervision, engineering, abstract fees, interest and discounts, and all other expenses incidental thereto, not exceeding the estimated cost, three hundred and thirty thousand dollars ($330,000) . . . be taxed and assessed against all of the lots, lands and parcels of land included in such tract, and that the several parcels of land . . . be assessed according to and in proportion to surface area, one square foot of surface to be the unit of assessment." Immediate payment for the work is provided for by the issuance of bonds, which in turn will be taken up when the assessments are paid. After the passage of the ordinance, the city brought condemnation proceedings against certain property holders who had improvements on their lots which it was conceived would be damaged by the fill, but no pro-

ceedings were instituted against persons owning unimproved lots in the district. This action was thereupon begun by the appellant to enjoin the prosecution of the work. In his complaint he alleged that he was the owner of unimproved property in the district sought to be improved; that his property would be greatly and irreparably injured and damaged by the proposed fill, and that such damages had not been first ascertained and paid to him. He then alleged that the ordinance, and the laws under which the ordinance was passed, were unconstitutional and void for various reasons, among which were that it sought to take his property without compensation and without due process of law.

To the complaint the city answered, expressly admitting that the complainant's property would be irreparably injured by the fill, but alleged that the tract sought to be filled was fast becoming unsanitary and a menace to the public health, and that the necessity for the work was imperative because of this fact; further answering, the defendants alleged that it is not the "intention of the city of Aberdeen to at any time condemn or appropriate the right to raise the said grade and fill the said streets and the said private property as aforesaid; that because of the matters and things hereinbefore set out the condition of the district is such that the city of Aberdeen has a lawful right to raise the said grade and fill said streets, alleys and private property without the payment at any time of any damage, . . . and that the city intends to and will make such fill in the manner set out herein, and in the complaint"; that is, at the cost of the private property therein according to area, without reference to benefits or injuries, or any consideration of relative values.

On the issues made a trial was had in which evidence was introduced on the part of the city tending to show that the tract in question was unsanitary, and that it was necessary to make the fill proposed to render it healthful, and, indeed, it may be conceded that such was the distinct weight of the

evidence. The trial judge concluded therefrom that the plaintiff was without cause of complaint, and entered a judgment dismissing his action with prejudice to his right to further litigate the questions involved. This is the judgment from which the present appeal is taken, and the judgment this court affirms in the foregoing opinion.

The judgment is affirmed on the ground, as I understand it, that the acts of the city, both committed and contemplated, are but a legitimate exercise of its police powers, and therefore invade no lawful right of the appellant. With this doctrine I am unable to agree. I have no doubt that when the owner of private real property suffers it to become a menace to the public health, either through the accumulation of stagnant water thereon or other causes, the municipality can, under its police powers, interfere and correct the evil even to the extent of destroying the property if the necessities of the case require it to go to that extent; and that it can, furthermore, if the nuisance is one created by the property owner, abate it at his expense. But this, as I understand the rule, is the beginning and the end of the police power over private property. The state cannot lawfully, under the guise of abating a nuisance, compel an owner to make his property conform to some previously conceived scheme of public improvement; it cannot compel him at his own expense, or at the expense of his property, to abate a nuisance on his own land created by another than himself; nor can it compel him to abate a nuisance in the public streets, or subject his property to the expense of abating it, beyond the benefit the removal of the nuisance confers upon it.

All these principles have been violated in the case before us. Nowhere is it pretended that it is necessary, for the purpose merely of abating the nuisance existing upon the appellant's property, to raise it up to the grade the city has adopted as its scheme of street improvement. No doubt that it will conduce to the public welfare to grade the street

to that extent, but it is clear that this goes far beyond the necessities of the case, if abatement of the nuisance is the ultimate purpose. Not only did the city raise the grades of the streets above those formerly existing, but the very resolution by which the proceedings were initiated calls it an "improvement," and to carry out the work it is proposed to "clear and grub" the lots preparatory to filling them—a proceeding wholly unnecessary if the mere abatement of a nuisance is the purpose of the city. That the city in the abatement of a nuisance is limited in its procedure to the removal of the cause of the nuisance is maintained by all authority. In 29 Cyc. 1218, the rule is stated as follows:

"A public nuisance may be summarily abated by the public authorities, but this power must be reasonably exercised, without doing unnecessary damage or injury to property, and is limited to a removal of that in which the nuisance consists."

So in *Eckhardt v. Buffalo*, 19 App. Div. 1, 46 N. Y. Supp. 204, it was held that the officers of the municipality exceeded their authority and rendered themselves personally liable, where, under the guise of abating a nuisance, they caused a new structure to be erected at great expense to the owner when the result sought to be accomplished could have been obtained by repairing and cleansing the old structure at a very moderate cost. In the course of the opinion this language was used:

"In *Matter of Jacobs* (98 N. Y. 98) it was held that while the legislature may determine that laws are required to protect and secure the public health, comfort and safety, it may not, under the guise of police regulations, arbitrarily infringe upon personal or property rights; and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts. With more persuasive force it may be said that no sanitary board or officer can be permitted, under the guise of a power to abate nuisances detrimental to health, not only to remove or abate the nuisance in so far as the public health and welfare may be endangered by its existence, but

also to proceed in a summary manner and cause new erections to be made and new appliances, contrivances and conveniences to be used and adopted, at a large expense to the owner, and far beyond what the exigencies of the particular case may require."

That an owner of land cannot be compelled to abate, at his own expense, a nuisance thereon caused by the municipality itself, or by some third person without the owner's connivance or consent, is also in accord with the great weight of authority. In the case of *Hannibal v. Richards*, 82 Mo. 330, the city constructed an embankment in the street in front of defendant's lots, which occasioned the water to accumulate on them and injuriously affect the health of the city. The defendant having refused to comply with an ordinance requiring him to fill the lots, the work was done by the city, and it brought an action to recover the cost and expense thereof. The court say:

"Now, we are asked to hold, also, that the city may create a nuisance upon the lot of an individual and then have it abated at his expense, if he refuse to do it when ordered. As well at once declare that no one can acquire any rights to town or city lots which the municipal corporation is bound to respect. The city cannot create a nuisance upon the property of a citizen and compel him to abate it. *Weeks v. City of Milwaukee*, 10 Wis. 269. The cost of filling the lots was the extent of defendant's liability, if any existed, and we see no reason why defendant should not have been permitted to show that it was less than plaintiff claimed. There is no law declaring municipal corporations infallible or that their demands are incontestible. The charter authorizing the city to fill a lot, on default made by the owner, gives her a demand against him for the cost of filling it, if done by the city, and the averment of the amount and cost of the work is one upon which an issue may be made. At a trifling expense at the time plaintiff passed the ordinance requiring these lots to be filled the pond could have been drained and but for the neglect of the plaintiff to make such drain the nuisance complained of would never have existed."

In *Weeks v. Milwaukee*, 10 Wis.* 242, 269, the defendant

city graded an alley adjoining, and made a fill in the street in front of plaintiff's lots, causing the water to flow and remain stagnant thereon, and a special tax of $498.75 was levied upon the lots by the city, $111.25 of which was to pay for the grading, and $387.50 for abating the nuisance created by the city as aforesaid. Plaintiff instituted an action to restrain the collection of the special assessment, and the trial court held the nuisance tax illegal. This view was sustained by the supreme court on a review of the case, Paine, J., delivering the opinion of the court, saying:

"I am also of the opinion that the tax assessed against the plaintiff's lots to abate a nuisance, which, it appears, was created entirely by the act of the city, in so constructing a street as to cause the water to flow and remain upon the lots, which it would not otherwise have done, is illegal. I cannot recognize the right of a corporation to create a nuisance on the lot of an individual. But to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this conclusion results from the reasoning of Mr. Justice Smith in *Goodall v. Milwaukee*, 5 Wis. 32, which I fully approve. And until I am prepared to say that private rights must yield, even to the extent of total destruction, rather than place any impediment in the way of whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen without making him any compensation for the damage, and then tax him to abate it."

In *Lasbury v. McCague*, 56 Neb. 220, 76 Pac. 862, it appeared that the city of Omaha in grading a street dammed the outlet of a stream, preventing the water from escaping, and causing it to back up on land owned by one Baer, where it stagnated and became a nuisance. The city passed an ordinance directing the lot to be filled with earth, and levied the cost thereof on the lot. In a suit to declare invalid the assessment the court said:

"It requires no argument to show that whatever nuisance existed on the lot in dispute by the reason of the accumula-

tion of stagnant water was directly chargeable to the city of Omaha. The foregoing quotation from the written stipulation of facts makes it perfectly plain that the nuisance abated by the city was created by its agents. This being so, to permit the city to assess the costs and expenses of abating the nuisance it created against plaintiff's lot would, indeed, be a reproach upon the law. If this special tax can be upheld in an equitable proceeding, then, by a parity of reasoning, one who creates a nuisance upon the land of his neighbor may have it abated at the expense of the latter and a court of equity could not afford relief. The mere statement of the proposition shows its absurdity."

That the nuisance sought to be abated in the present case was not caused by the appellant cannot be gainsaid. As long as the tides of the sea were permitted to ebb and flow over it, as they were wont to do in a state of nature, the land was wholesome. It became to the contrary only when the embankments by the railroads and by the public for highways were constructed which cut off this flow. These were not of the appellant's construction, and to charge him with the abatement of a nuisance caused thereby violates every principle of justice.

I have found no adjudicated case where a municipality has attempted, under its police powers, to abate a nuisance in the public streets at the expense of the abutting and adjoining property, where the owners of the property were not the creators of the nuisance. Heretofore it has been supposed that this required the exercise of the powers of eminent domain, proceedings in which the property holder had a right to be heard on the question of the cost of the proceeding and the amount it was proposed to tax against his property. In this proceeding the appellant has been denied this right. He at no time had, or has had, an opportunity to question either the necessity of the work, the amount it is proposed to pay for it, or the proportionate share thereof it is proposed to assess upon his property. This is taking his property for a public use without compensation and without due process of law. But this particular case has peculiar hardships. It

will be remembered that the appellant alleged in his complaint that his property would be irreparably damaged by the fill the city proposed to make, and that this allegation was expressly admitted in the answer of the city; not by mere silence or failure to deny the allegation, but in express words. It will be remembered also that certain lots in the district have buildings upon them recognized as improvements and which the city has condemned and paid for; that the lots sought to be filled are unequal in value, and unequal in respect that some of them require more material to fill them than will be required to fill the appellant's lot, and also that some of the lots will be materially benefited by the fill, yet it is proposed to pay the cost of the work by an assessment upon the lots within the district according to area. In other words, the appellant's lot, which is irreparably damaged by the fill, is taxed to pay not only for the fill itself, but to pay damages assessed to other lots which may be materially benefited by the fill. Aside from the fact that this seems directly contrary to the first section of the act under which the city is proceeding, I can find no authority that justifies it, even where the principle is seemingly favored by the legislature.

The drainage cases are cited by the majority as maintaining this doctrine, but I cannot think them in point. None of them lay down the rule that property in the district proposed to be drained can be taxed indiscriminately to pay the cost of the work regardless of the question of the originator of the nuisance, or whether the property proposed to be assessed is benefited or damaged by the work. On the contrary, the assessment is sustained on one or both of two theories, either that the owner of the land was responsible for the nuisance and under obligations to remove it, or its removal distinctly benefited his property. I have referred to some of the cases where the first question was involved, examples of the second can be found in the main opinion. Take for instance the case of *Hagar v. Reclamation District,*

111 U. S. 701. There the tax was upheld on the express ground that it was levied on property benefited, as witness the following extract from the opinion of the court:

"In some states the reclamation is made by building levees on the banks of streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received."

To the same effect is *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112. And so Cooley in his work on taxation, at the place cited by the majority, says that the "special benefits from the enhancement of values must accrue mainly to the owners of the lands drained, who ought therefore to bear the expense," clearly indicating that the basis of the right to assess in such cases was the fact that the work conferred a benefit. But it is needless to pursue the inquiry. As I say, I can find no case where private property damaged by a fill is taxed not only to make the fill causing the damage, but to fill other property both public and private, some of which is actually benefited by the fill.

I regret also that the majority have seen fit to declare that a front foot or area assessment, whether in proportion to or in excess of benefits conferred on the property by the improvement, violates no constitutional inhibition. In *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557, it was held, it is true, that such an assessment did not violate the provisions of the constitution relating to equality and uniformity in taxation, but the principle of that case, as I understand it, has been repudiated by a long line of cases decided by us since that time. In *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791, an assessment for a street improvement was attacked on the ground that it was made on a front foot

basis and not in accordance with benefits. In its opinion the court conceded that the true rule was that an "assessment must be tested by benefits, and that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation"; holding, however, that the statute under which the assessment was made did require an assessment according to benefits, and not a front foot assessment. To the same effect are the following cases: *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236.

This, to my mind, is the only rule that can logically stand the constitutional test; for any rule that taxes property in excess of benefits that is not applied to all property alike takes such property for public use without compensation.

It is finally suggested in the opinion that the relator may find relief in a hearing upon the assessment roll. But in the face of the statute declaring that his property, being unimproved, shall not be considered damaged by the fill, the positive declaration of the city in its answer to his complaint that it "has a lawful right to . . . fill private property without the payment of damage," and intends to exercise that right, and the announcement earlier in the opinion of the majority that the city will not exceed its powers in so doing, I am afraid the appellant's chances of remuneration from this final test are not of the best. But the argument is not sound for another reason, it overlooks the constitutional requirement that damages to property taken for a public use must be ascertained and paid into court for the owner before his property is taken.

The judgment appealed from should be reversed.

[No. 8538. Department One. May 31, 1910.]

THE STATE OF WASHINGTON, *on the Relation of George Stalding et al., Plaintiff*, v. THE CITY OF ABERDEEN *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—POLICE POWER—EMINENT DOMAIN—FILLING LOW LANDS—DAMAGES—COMPENSATION. The act of 1909, empowering cities, in the exercise of the police power, to fill low lands, is not invalid or inconsistent in that it provides for compensation to the owners of buildings or improvements under the right of eminent domain; since the right of eminent domain and the police power rest in the control of the legislature and may be employed singly or together, and interested parties cannot object because compensated in any degree.

SAME—ASSESSMENTS—DAMAGES. In proceedings by a city to fill low lands, the damages and expenses paid by the city in condemnation suits may be added to the costs of the improvement and assessed against the property in the district.

FULLERTON, J., dissents.

Certiorari to review an order of the superior court for Chehalis county, Sheeks, J., entered December 27, 1909, adjudging a public use and necessity in condemnation proceedings, after a hearing on the merits before the court. Affirmed.

J. B. Bridges, for relators.

A. M. Wade and *T. B. Bruener*, for respondents.

CHADWICK, J.—This case comes to us as a companion to the case of *Bowes v. Aberdeen*, *ante* p. 535, 109 Pac. 369. That case decides all of the propositions raised in this one, save two which will be hereafter discussed. The city of Aberdeen began an action to condemn the improvements upon the lots owned by the relators, and from an order of condemnation, this proceeding in review is prosecuted. The facts and the law under which the city seeks to improve the district affected are set out or referred to in the *Bowes*

[1]Reported in 109 Pac. 379.

opinion. Section 3 of the act of 1909, Laws 1909, page 570 (Rem. & Bal. Code, § 7973), provides that, if it be necessary in making the improvements contemplated, by the act to take or damage private property, the city may proceed to acquire such right by the power of eminent domain; and further that, if it be necessary to take any buildings or other improvements situate within the district proposed to be filled, the compensation therefor shall be ascertained under the eminent domain statute, and that no account shall be taken of benefits by the jury or court in assessing the amount of compensation to be made to the owner of any property, but that such compensation shall be assessed without regard to benefits.

The point is made that the legislature did not intend that the lands involved should be filled under the police power, because of these provisions in the law; for had the intention of the legislature been as indicated, it would not have provided for compensation to the owners of improvements. Or, to put it in another way, the two proceedings cannot go hand in hand, but the city must proceed under one to the entire exclusion of the other; and the legislature having involved the two, the whole act must fall. We are of opinion, and have so held, that the power of the city to proceed in the manner indicated is properly referable to the police power. But it does not follow that, because the city may relieve a condition under that power, it may not at the same time, under legislative direction, meet by condemnation those rights of property which are in no way dependent upon the condition sought to be overcome. The whole matter is one which the legislature may control, and in granting the right to a city to drain or fill swamp, marsh, or tide lands situate within its limits, it is not inconsistent to say that an owner shall be compensated in damages for any buildings or improvements theretofore placed upon the lands. This being the law, it is well within the power of the legislature to say that, while low, undrained lands may be filled, the city shall

not, in the exercise of that power, confiscate improvements lawfully made.

In *Chicago v. Union Stock Yards*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281, it is said:

"The power in the city to abate nuisances is not denied, but it does not follow that the city may, as the easiest way to abate the nuisance, destroy valuable private property susceptible of use for a lawful purpose."

Legislation tending to the preservation of the public health is favored by the courts, and is regarded as a power inherent in a municipal corporation where population is congested. 28 Cyc. 709; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230. But the power must be exercised within a proper limit—in this case, the filling of the district—and when the city goes beyond that limit, the legislature should provide, and it has in this case provided, for compensation to those whose property stands in the way. If it did not, it would result in the confiscation of unoffending property. Both the right of eminent domain and the police power rest in the control of the legislature, and it may lawfully grant the right to exercise them singly or together, as the exigencies of the case may require. Aside from these general considerations, we are of the opinion that, if the city can, under its police power, fill the district—and we have so held—the relators here cannot be heard to complain if, in the exercise of its right, the legislature has seen fit to compensate them in any degree. They cannot complain against the law, because they are compensated for such property as is actually taken or damaged.

The only question remaining to be discussed is that the city cannot condemn property within the district and add the damages and expenses of the suit, surveys, etc., to the cost of the improvement, and assess the whole thereof to all the property in the district. As was said in *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827, and *Puyallup v. Lacey*,

43 Wash. 110, 86 Pac. 215, that question cannot arise in this case.

"Whatever damages are assessed in this proceeding must be paid by the city, before the property can be taken or damaged as in other cases."

Other questions are presented, but they are not discussed with reference to authorities and, as we are at present advised, are without merit.

The judgment of the lower court is affirmed.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

FULLERTON, J., dissents.

[No. 8738. Department One. June 1, 1910.]

THE STATE OF WASHINGTON, *on the Relation of C. H. Pealer, Plaintiff*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents.*[1]

NAVIGABLE WATERS—OBSTRUCTION—LOGS AND LOGGING—BOOMS—NUISANCES—EMINENT DOMAIN. Rem. & Bal. Code, § 7122, granting boom and driving companies the right to construct booms and splash dams for the driving of logs and timber products, under the right of eminent domain, provided that the "outlet" of the stream is not obstructed, by necessary implication gives the right to obstruct restricted navigation in small streams at times, where such use is necessarily an exclusive one; and such obstruction would not fall within the general statutes defining nuisances, or be a valid objection to eminent domain proceedings to condemn the right to overflow lands.

NAVIGABLE WATERS—NAVIGABILITY—FEDERAL STATUTES. A stream is not navigable in the Federal sense, within 26 Stat. 454, § 10, prohibiting an obstruction to the navigable capacity of waters over which the United States has jurisdiction, where it was only navigable in a restricted sense for a distance of three or four miles at high tide for small boats drawing three or four feet of water.

Certiorari to review a judgment of the superior court for Chehalis county, Irwin, J., entered March 25, 1910, in pro-

[1]Reported in 109 Pac. 340.

ceedings to condemn the right to flood and damage lands for the use of a booming company, after a hearing on the merits. Affirmed.

W. H. Abel, for relator, contended, *inter alia*, that a boom company has no right to block a navigable stream. Rem. & Bal. Code, § 7112; *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890; *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211; *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 103 Pac. 814, 132 Am. St. 1127. Where the rights sought to be acquired by condemnation proceedings cannot in any event be exercised, then condemnation will be denied because same is not necessary in contemplation of law. *In re Brooklyn El. R. Co.*, 11 N. Y. Supp. 161; *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855; *In re Milwaukee Southern R. Co.*, 124 Wis. 490, 102 N. W. 401; *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 427, 107 N. W. 405, 5 L. R. A. (N. S.) 638; *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105. The diversion of waters from a navigable stream to such an extent as to appreciably impair its navigability is an obstruction. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. The obstruction of a navigable river is a special injury to any person desiring to navigate, or who might have occasion to navigate it. *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Judson v. Tide Water Lumber Co.*, 51 Wash. 164, 98 Pac. 377; *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632.

Bridges & Bruener, for respondents.

Gose, J.—The respondents are allied corporations, having the same stockholders and a common management. The case was before this court in another form. See *State ex rel. Grays Harbor Boom Co. v. Superior Court*, 57 Wash.

71, 106 Pac. 481, for a more complete statement of the facts. The boom company has a boom extending up the Humptulips river from its mouth for a distance of a mile or more. The driving company has its splash dams forty and fifty miles respectively above the mouth of the river. The petitioner owns land contiguous to the river and a small slough called Berg's Slough, about one-fourth of a mile above the boom. The Humptulips river is a tidal stream and flows into Grays Harbor. The object of the action is to condemn the right to flood and damage the petitioner's land. The court found:

"That the smaller boats of Grays Harbor, drawing from three to four feet of water, can get into the mouth of said river and up the same for a distance on the tides; that the said river is navigable in a restricted sense in tide water; that occasionally such smaller boats have been in the habit of visiting said river for special purposes; such as taking in supplies, or scows; that said river is a floatable stream for its entire length; that such boats as can get into the river and navigate thereupon can now, and will in the future be able to go through the channel left open by the said boom and up to the upper end of the boom;"

that in the process of driving logs to the boom, both in flood season and by artificial freshets, the logs become congested above the boom and block the river immediately above it and opposite the petitioner's land, and obstruct navigation at that point "for a considerable and material portion of the year"; that the blocking of the stream to the extent stated "is the necessary result of the operation of the driving company, and that such blocking is unavoidable"; that the contemplated use is a public use; that the public interest requires the prosecution of the enterprise, and that the boom company and the driving company are entitled to condemn the privilege sought.

The petitioner seeks to reverse the decree by a writ of review. The point relied upon is that the ultimate effect of the decree is to permit the boom company and the driving com-

pany to obstruct navigation, and this the petitioner asserts is to permit it to commit a public nuisance. The latest legislative expression touching boom and driving companies is Laws of 1905, page 108 *et seq.* (Rem. & Bal. Code, § 7122 *et seq.*). Section 1 of this act, which is an amendatory one, provides that corporations organized for clearing and improving rivers and streams for the purpose of driving, sorting, holding, and delivering logs and other timber products thereon, shall have power, in any of the rivers and streams of the state, to improve and straighten the channel, build wing dams and sheer booms, construct dams and gates or otherwise, for the purpose of storing water with which to produce artificial freshets, and for the purpose of holding logs and other timber products; provided "that no such wing dam, sheer boom, dam with gate or otherwise, shall be so constructed, maintained or used as to in any manner obstruct or impede the outlet of such stream; and provided further, that if any such wing dam, sheer boom, dam with gate or otherwise shall be so constructed, maintained or used as to interfere with the use for any purpose of the waters of any stream so dammed or used, or any of its tributaries, or in any manner to injure or damage any lands adjacent to such stream or its tributaries, compensation for such interference with the use of such water and for any such injury or damage shall be first assessed and determined and the appropriation thereof may be made by the exercise of the power of eminent domain, . . ." It will be observed that the ultimate relief sought in this action, viz., the right to flood the land of the petitioner, is expressly authorized. The only limitation is that the "outlet" of the stream shall not be obstructed.

The court expressly found, and the evidence shows, that there is an open channel along the boom, and that the only obstruction to navigation is above the boom. The evidence shows that the river is navigable in a restricted sense for a distance of three or four miles from its mouth when the tide

is in; that a boat cannot enter the river from the harbor except on the tide, and that it is used for navigation only for particular purposes such as "taking in supplies or scows." This court has held, however, that a stream is navigable in a legal sense if it is in fact navigable. *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. The respondents are engaged in a lawful and important public service. It is only because they are public carriers that they are permitted to exercise the high prerogative of eminent domain. It is apparent that they must obstruct the river above the boom at times, or cease to do business. The legislature, in granting the right to construct a boom and splash dams and drive logs and timber by artificial freshets, by necessary implication gave the right to obstruct navigation at times. It is, as the court found, unavoidable in accomplishing the purpose for which the respondents were created. Necessarily, therefore, they do not fall within the general statutes on nuisances as defined in Rem. & Bal. Code, § 943, and Rem. & Bal. Code, §§ 8308 and 8316. *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937, and kindred cases, were injunction suits where property was being damaged without the right to do so having been acquired by purchase or condemnation, and are, therefore, not in point. The use of a stream such as the Humptulips river, a stream two to three hundred feet in width, for the purpose of floating and holding logs, is necessarily at times an exclusive use, and either such right must be conceded or the business of floating logs in such streams must cease. The legislature, we think, contemplated the precise contingency.

It is further insisted that the present use is violative of the Federal statute (26 Stats. at Large, 454, § 10), in that it creates an obstruction, not affirmatively authorized by law, to "the navigable capacity" of the waters of which the United States has jurisdiction. We do not think the river is a navigable one within the purview of the Federal statute, as that term has been defined by the supreme court of the

United States. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. In that case the court quotes approvingly the words of Chief Justice Shaw (21 Pick. 344), as follows:

"It is not, however, every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

As we have seen, the present use of the stream is authorized by the laws of this state, and if the river is not navigable in the Federal sense, the relief sought is not violative of that act.

The decree is affirmed.

RUDKIN, C. J., FULLERTON, and MORRIS, JJ., concur.

CHADWICK, J. (concurring)—Appellant rests his contention upon the proposition "that the right to do an unlawful thing, the creating of a public nuisance, cannot be acquired under the power of eminent domain." He assumes that any obstruction of the right of free navigation in the Humptulips river is a purpresture or blocking of a highway which, under our statute and under the common law, has been declared to be a nuisance. If this were literally true, appellant's argument would be unanswerable; but the question he raises is not new and, where it has been considered by other courts, has been resolved as we have resolved it. The particular question whether the obstruction of a floatable stream is a nuisance, quite naturally came up in those states where the logging industry first assumed commercial proportions. In an early case in Maine, *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573, it was held, that every person has an equal right to the reasonable use of navigable waters as public highways; that what constitutes a reasonable use depends upon the circumstances of each particular case, and that the rights of the parties cannot be defined or regulated with entire precision; that the courts must regard the subject-

matter of the use, the occasion and manner of its application, its object, extent, necessity, duration, established usage of the country, and the size of the stream and its volume. Waters which are not navigable for ordinary commercial purposes, or in the "Federal sense," as Judge Gose puts it, are subject to state regulation and control; and the power of the state in this behalf will be measured by the necessities of its commerce as well as the rights of the riparian proprietor. In *Hamilton v. Vicksburg etc. R. Co.*, 119 U. S. 280, a similar question to that before us was presented. The navigation of a stream had been wholly prevented for a period of six weeks, and an action was brought to recover damages by reason of this obstruction. The defendant company justified under state legislation, and on the ground that its action was necessary and performed with reasonable care. The plaintiff claimed that the state legislation was void because it violated the compact of the state with the Federal government guaranteeing the free navigation of the river. The state court had held that no recovery could be had under such circumstances, and this was affirmed by the supreme court of the United States, that court holding that, in all such cases and until Congress intervenes and exercises its authority, the power of the state is plenary, the only limitation being that the acts of those obstructing navigation at times should not be unreasonable or interfere *unnecessarily* with the navigation of the streams. To the like effect is *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, where the authorities are collected:

In *Pound v. Turck*, 95 U. S. 459, the judgment of the lower court was reversed because the jury had been instructed, in effect, "that if the structures of the defendant were a material obstruction to the general navigation of the river, the statute of the state afforded them no defense though they were built in strict conformity to its provisions." If the Humptulips river is not navigable in the "Federal sense," these authorities are controlling.

In *"City of Erie" v. Canfield*, 27 Mich. 479, Judge Cooley said:

"The fact that the boom embraced a portion of the navigable waters of the Manistee river, capable of being navigated by vessels like this, does not necessarily constitute it a nuisance which may be abated by force. It appears by a map which is in evidence by stipulation, that the boom is in the river between Manistee City (then a considerable village) and the lake, and it would seem from the judge's opinion, which is returned, that considerable evidence was taken to show its necessity, and whether it did or did not constitute an unnecessary impediment to navigation. The circuit judge examined this question elaborately, and reached the conclusion that it did not. The evidence on which he acted is not returned, and the correctness of his conclusion on its weight and credibility has not been argued. It is clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season—where, in fact the principal industry consists in cutting, floating, and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation; the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place upon the market. It is just and reasonable, therefore and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream. The question whether a nuisance or not, is complicated; it must depend in any case upon the particular facts, and the necessities and

convenience of each interest must be considered and compared before the proper conclusion can be reached."

In *Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co.*, 84 Mich. 462, Judge Cooley said:

"The questions then are, *first*, whether the appropriation is of something which is common to the public; and if so, then, *second*, whether it is made in a manner or under circumstances which justify or excuse it. In considering these questions it is important that we bear in mind the sort of navigable water we are dealing with. Navigable waters at the common law are those where the tide ebbs and flows; under these the public have a proprietorship in the soil itself; and in various ways the sovereign authority may make use of this ownership for the benefit and protection of navigable rights as well as for other purposes. The Muskegon river, it need hardly be said, it not of this character, and the public have no rights whatever in the soil under it. Neither is it a navigable stream, at least at the point where the alleged purpresture exists, in the more popular sense of that term, for it is only a small stream whose value to the public consists in the use which can be made of it for the purpose of floating logs and lumber. The right of floatage is unquestionably a right which the state should guard and protect; but it is a serious mistake to assume that the private appropriation of a part of the bed of the river would necessarily be either a purpresture or a nuisance. The property taken in such a case is not public but private property, and the owner of the bank, who also presumably owns to the center of the stream, may maintain trespass or ejectment against the taker. If the owner makes no complaint, the public can have neither right nor occasion for any, provided the navigable rights are not abridged. If they are, it is not very manifest how this can be a purpresture. The difference between the highway by land, with its definite limits to which the public right extends, whether the whole is used or not, and the highway for floatage in our small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give variable limits, as the seasons and the needs of business and traffic may change, is so plain that the difference between an appropriation in the two cases needs only to be mentioned. It requires neither argument nor illustration. The one is a

public grievance of some sort; but the other is no public grievance of any sort, unless the public use is unreasonably abridged or inconvenienced. But if the appropriation of a part of such a stream were presumptively a public injury, the public must be deemed to have waived its right to complain, so far as the appropriation was not unreasonable, when the law permitting the organization of booming companies, and regulating their operations, was enacted. This is so because some appropriation is essential to their operations. Nothing can be a nuisance which the sovereign authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all. The question of lawfulness in the action of a booming company in enclosing part of the stream for its own purposes, whether it is done by permanent structures or otherwise, must therefore necessarily be a question depending on the particular facts; it is a question of nuisance or no nuisance; in other words, it is a question whether the general public desiring to avail themselves of the navigable rights, are or are not more inconvenienced than accommodated thereby. If they are not, the enclosure is not unlawful; if they are, it may be."

Watts v. Tittabawassee Boom Co., 52 Mich. 203, 17 N. W. 809, is a case somewhat similar to this. It was there held that a boom company is liable in damages for needlessly or wilfully obstructing a navigable stream, to the hindrance and consequent injury of persons having an interest in its navigation. In the course of the opinion it was said:

"It has always been proper to stop a mass of logs in a river for the purpose of securing the rights of several owners of the same, or to prevent their loss or destruction. Of course, when this is done on the small streams, navigation is of necessity for the time being impeded. The only question which can arise in such cases is whether the stoppage of the logs was done in a reasonably prudent manner, and was continued no longer than was necessary to accomplish the object."

The Wisconsin cases are to the like effect. *Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. 837; *Field v. Apple River Log Driving Co.*, 67 Wis.

569, 31 N. W. 17; *Edwards v. Wausau Boom Co.*, 67 Wis. 463, 30 N. W. 716.

Reference to some of the cases will show that they were decided upon general principles of the law, and not under the legal conditions existing in this state where the boom company is given the right to condemn and meet the consequential damages resulting to the landowner because of its operations. It would, therefore, seem that, if the occasional obstruction of a floatable logging stream is not a nuisance in and of itself, as reasoned by Judge Cooley and others who have met this question, the relator in this case cannot be heard to complain if the damages that he will suffer because of these obstructions are determined and paid him at this time, rather than put him to occasional lawsuits to recover for each particular obstruction which might be found to be unreasonably or unnecessarily prolonged.

[No. 8625. Department One. June 1, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Harry H. Collier, Plaintiff*, v. EMMA H. A. BELL, *Appellant*.[1]

PARENT AND CHILD—CUSTODY OF CHILD—RIGHT OF PARENT—EVIDENCE—SUFFICIENCY. The paramount right of the parent to the custody of his child being subject only to the welfare of the child, a father cannot be deprived of the custody of a son, ten years of age, where it appears that he is a fit person, earning $100 to $150 a month for the support of a family of six children, who were properly clothed, regularly attending school, and required to assist in ordinary work about the house; and the fact that their stepmother is strict in disciplining the children does not warrant awarding the custody to another.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered September 7, 1909, upon findings in favor of the petitioner, in habeas corpus proceedings by a father to obtain possession of his minor son, after a hearing on the merits. Affirmed.

[1]Reported in 109 Pac. 51.

F. Campbell, for appellant.

Hayden & Langhorne, for relator.

Gose, J.—This is a habeas corpus proceeding, prosecuted by the petitioner to procure the possession of his son, a child ten years of age. The trial court, after a hearing upon the merits, found that the petitioner, the father, was a fit and proper person to have the care and custody of the child, and entered a judgment directing the appellant to deliver the child to him. From this judgment, the appellant prosecutes this appeal.

The material facts presented by the record are, that the petitioner's first wife, a daughter of the appellant, died in childbirth in 1900, leaving four children, the youngest an infant boy over whose custody this suit is waged; that the appellant, the child's grandmother, lived in the respondent's home and cared for the children for a period of four years, and until the respondent remarried in July, 1904; that she then left his home and took the boy with her, keeping him until December 26, following, when he was returned to the respondent, who kept him until June 1908. On that date the appellant was allowed to take him, and having refused the demand of respondent to return him, this action was commenced.

The appellant first contends that the respondent in 1900, upon the death of his wife, gave the boy to her. The trial court, however, refused to find that fact, although the appellant made a written request therefor. The evidence upon this question is conflicting, and we do not find it necessary to determine where the truth lies. This court has uniformly held in such cases that the paramount right to the custody of the child is in the parent, and that such right will be denied only where the good of the child demands it. As was said by this court in *In re Neff*, 20 Wash. 652, 56 Pac. 383: "The parents are the natural guardians and entitled to the care, control

and society of their children." Treating this question in *Carey v. Hertel*, 37 Wash. 27, 79 Pac. 482, it is said: "He [the father] is not only primarily entitled to her care, but he is a suitable person to be charged therewith, . . . and is entitled to the comfort of her society." The same view is announced in *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 Pac. 660, 43 Am. St. 839, and *Id.*, 14 Wash. 211, 44 Pac. 253.

The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child. The appellant's claim that the stepmother is cruel to the child is not supported by the evidence. The fact that the daughter, thirteen years of age, is required to split and carry in wood, feed the chickens, and assist in milking the cow does not show cruelty. Nor does it prove either that the father is wanting in paternal affection, or that he is not a fit or proper person to have the guardianship of the boy. Two children have been born as issue of the second marriage. The family, consisting of six children, the father, and the mother, is supported by the earnings of the father, varying from $100 to $150 per month. The evidence shows that the children are taught the virtues of industry and obedience; that they are properly clothed, and that they have regularly attended school. The testimony of the father relative to the daughter cutting and splitting wood is that she assists him in that work; that he thinks splitting wood is a better occupation for the girl "than running around the streets." With this view we quite agree. The fact that the father required the children to assist in the ordinary work in and about the home, and the fact that the stepmother is strict in disciplining the children, do not afford sufficient reasons for awarding the custody of the boy to the grandmother. On the contrary, if it appeared that the father would not teach the boy the habits of industry and obedience, he would not be a proper person to have his care and custody.

We think we have sufficiently reviewed the evidence. The judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8865. Department One. June 1, 1910.]

THE STATE OF WASHINGTON, *on the Relation of* L. F. McCONIHE, *Plaintiff*, v. R. S. STEINER, *as Judge of the Superior Court for Grant County, Respondent.*[1]

JUDGMENTS—VACATION—COURTS—TERMS. Under the Washington practice, the superior courts having no terms, their judgments have no probationary period in which they are subject to the control of the courts, except under the statutory right to vacation or modification.

JUDGMENTS—VACATION—PERSONS ENTITLED. The superior court has no power, on its own motion or at the instance of a stranger appearing as *amicus curiae*, to vacate a judgment for fraud and collusion, there having been no real controversy between the parties.

JUDGMENTS—CONCLUSIVENESS—PARTIES BOUND. Judgments fixing the rights of the parties to the action in the waters of a lake, although general in form, are binding only upon the parties and their privies.

Application for a writ of prohibition, filed in the supreme court May 12, 1910, to prevent the vacation or modification of a judgment by the superior court for Grant county, Steiner, J. Writ granted.

E. W. Husted and *P. C. Sullivan*, for relator.

Peacock & Ludden, for respondent.

FULLERTON, J.—In this proceeding the relator seeks a writ of prohibition against the superior court of Grant county, prohibiting it from proceeding to vacate, modify, or set aside a certain judgment or decree entered in that

[1]Reported in 109 Pac. 57.

court on March 23, 1910, in an action pending therein, wherein C. Victor Martin and William Turner were plaintiffs, and the relator was defendant. The complaint on which the action was tried is not set out in the record, but it can be gathered from what is made to appear that the plaintiffs sued to enjoin the defendant from interfering with their claimed right to divert from Moses lake, in Grant county, water to the extent of 200 inches, miners' measure, under a six-inch pressure, for irrigating, stock and domestic purposes. To the complaint an answer was filed, which put in issue its allegations of superior rights, and by way of an affirmative answer, set up a right in the defendant McConihe to the waters of the lake and to Crab creek, a tributary thereof, to the extent of 4,700 cubic feet per second of time.

The action was brought on for trial on March 23, 1910. On the call of the case the plaintiffs stated to the court the issues making up the controversy between the parties, and then produced witnesses who gave evidence tending to substantiate the allegations of the complaint, or, as the court states in its return, evidence ample, in the absence of a contrary showing, to sustain the plaintiffs' contention. The defendant then proceeded to offer evidence on his own behalf, whereupon the court inquired of their attorney whether he proposed to controvert the case made by the plaintiffs, and was answered to the effect that he did not; that the defendant would have to admit that the plaintiffs' rights in the waters of the lake were superior to their own. The attorney for the plaintiffs then stated that the plaintiffs had no controversy with the defendant except on the question of priority, and if the defendant was willing to admit that the plaintiffs' rights were superior to the defendant to the amount of water claimed by them, he had no objection to a decree in the the defendant's favor, provided it was made subject to the plaintiffs' decree. The court thereupon directed a decree accordingly, no other proofs being taken.

Subsequently two sets of findings and decrees were sub-

mitted for the judge's approval, which, after explanation, were signed by him and filed as decrees and judgments of the court. The material part of the decree in favor of the plaintiffs was as follows:

"(1) That the plaintiffs are the owners of the first right to divert the waters of Moses Lake in Grant county, State of Washington, to the extent of 200 inches, miners' measure under a six inch pressure, and to use the same for irrigation, stock and domestic purposes.

"(2) That the claims of the defendants, and each of them, in and to the waters of said lake adverse to the aforesaid rights of the plaintiffs are without foundation, and all the rights of the defendants, or either of them, in and to the waters of said lake are subsequent and inferior to the aforesaid rights of the plaintiffs.

"(3) That the defendants, and each of them, are hereby forever enjoined from claiming any right, title or interest in or to the waters of said Moses Lake adverse to the right of the plaintiffs to divert and use 200 inches of said water, miners' measure under a six inch pressure, and that the said defendants, and each of them, are hereby forever enjoined from in any wise interfering with the plaintiffs' use and enjoyment of said right.

"(4) That the plaintiffs have and recover from the defendants their costs and disbursements in this action."

That of the defendant was as follows:

"(1) That the defendant, L. F. McConihe, is the owner of the right to store water for the purpose of irrigation, stock and domestic uses, in Moses Lake and Crab Creek, in Grant county, Washington, except only as hereinafter stated, to the extent of 1000 cubic feet per second of time.

"(2) That said defendant L. F. McConihe, is the owner of the right to divert the waters of said Moses Lake, and that part of Crab Creek extending from its source in section 16 twp. 21 N. R. 27 E. W. M., in said county and state, commonly known as the first rise of Crab Creek, to the point where said Crab Creek empties into said Moses Lake, Wash., all in Grant county, Washington, together with all the underground waters lying, flowing and being beneath said Moses Lake and that part of Crab Creek above described, and appurtenant to said lake and creek, except only as hereinafter

stated, to the extent of 4700 cubic feet of water per second of time, and to use the same for irrigation, stock and domestic purposes.

"(3) The rights to store, divert and use the waters of Moses Lake and Crab Creek above decreed to the said defendant, L. F. McConihe, are subject only to the prior right of C. Victor Martin and William Turner, to the diversion and use of the waters of said Moses Lake for like purposes, to the extent of 200 miners' inches per second of time, under six inch pressure, as adjudged to them under decree of even date herewith."

On April 13, 1910, one James O'Sullivan, an attorney, appeared before the court, and as *amicus curiae* orally moved the court to vacate the decrees, stating as grounds therefor that they were entered by collusion and fraud; that there was no real controversy between the plaintiffs and the defendant, but that the action was begun for the purpose of manufacturing evidence to be used in certain contest proceedings in which the question whether the plaintiffs or the defendant had water rights in Moses lake and Crab creek were material considerations. The court thereupon ordered that the attorney be permitted to appear as *amicus curiae* to present a motion to vacate the decrees, and directed that the plaintiffs and defendant be cited to appear on a day named and show cause why the decrees should not be vacated. The parties appeared on the day appointed and objected to the jurisdiction of the court to entertain the proceedings, contending that the court had no power, either on motion of an *amicus curiae* or on its own motion, to vacate a judgment or decree over the protest of the parties in interest or persons adversely affected by the decree. The court overruled the objection, and was proceeding to hear the application on its merits when this writ was sued out. The record, therefore, suggests the question of the power of the court, on its own motion or on the motion of a stranger to the record, over the protest of the parties thereto, to inquire whether a judgment entered by it has been collusively and fraudulently obtained, and to vacate and set it aside if it so finds.

It has seemed to us that the court is without such power. In considering the question it must be remembered that judgments under our practice have no probationary period in the sense that they are subject to the control of the court and subject to be set aside, vacated or modified by it on its own motion, as were judgments at common law during the term at which they were rendered or entered of record. Our courts, on the contrary, have no terms. The court has the same power to enter a judgment on one judicial day as it has on another, and its judgments, subject to the power of vacation or modification given by statute, have the same finality when first entered that they have at any time thereafter. In other words, subject to the statutory right of vacation, they have the quality of a common law judgment after term, immediately upon their rendition and entry of record. The power of the court to vacate a judgment under the circumstances shown here must, therefore, be found either in the statute or in the inherent powers possessed by a common law court over its judgment after term.

Turning to the statute we find nothing that permits a court, on its own motion or at the request of a stranger to the record, to exercise the power. By section 235, Rem. & Bal. Code, the court may, on good cause shown, vacate a judgment entered without personal service of summons, and by section 303 it may, in the furtherance of justice, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and by section 464 it may grant relief from a judgment for a number of causes therein defined; but it will be observed that in each of these instances the relief granted must be on application of a party to the record adversely affected by the judgment. It is nowhere even intimated that a stranger to the record or the court, on its own motion, might make the application. Nor do we find that the court has any such inherent power in virtue of the common law. While at common law a court might, either on its own motion or on

the motion of an *amicus curiae* dismiss a pending action, its power ceased on the entry of the judgment therein. The rule is that, after the term has ended, all final judgments and decrees of the court pass beyond its control. These principles are well stated in the case of *In re Burdick*, 162 Ill. 48, 44 N. E. 413, in the following language:

"It is settled law that while a collusive or fraudulent suit is still pending the court will, at the suggestion of either a party to the record, or a person in interest or who may be prejudiced by the judgment, or even at the instance of a stranger who appears as *amicus curiae*, or upon its own motion, dismiss such suit out of court. . . . And the same rule applies where the false and fictitious case is pending in a court of review on appeal or writ of error, and such appeal or writ of error will be dismissed. . . . And the rule that is applicable where both parties collude to get up a case for the opinion of the court is applicable to a case where one of the parties becomes owner of the whole opposing interest and sole party in interest, and is *dominus litis* on both sides.

"We understand the doctrine to be, that the person making application, whether by motion or by bill in chancery, to set aside a judgment after the end of the term in which it was obtained, must either be a party to such judgment or in privity with such party, or be possessed of rights or equities which are directly and injuriously affected by the judgment. There are many cases where the court, at a term subsequent to that at which a judgment or decree was rendered, has interposed to set aside such judgment or decree for either fraud or collusion, but we know of none in which such action has been taken where the party applying for such relief has not been within one or the other of the above mentioned classes of persons. To permit strangers whose rights or interests are not directly and injuriously affected by the judgments or decrees to overturn adjudications to which the parties and those in privity with them make no objections, would encourage litigation and disturb the peace of society."

See, also, *Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573; *Bronson v. Schulten*, 104 U. S. 410; *Robinson v. Stevens' Adm'r*, 63 Vt. 555, 22 Atl. 80.

In the argument submitted in support of the action of the trial court it seems to be assumed that these decrees fix the rights of the parties to the waters of Moses lake and Crab creek, not only as between themselves, but as to other and third parties claiming interests adverse to such parties. But a moment's reflection must convince any one that this view is erroneous. Although general in form, and broad enough in language to include the whole world, they can have no such effect. They are binding on the parties to the action and their privies, but upon no one else. As to strangers claiming rights in the waters of the lake, the decrees in no manner affect them; the decrees are not even evidence of adverse rights. Strangers may proceed as if the decrees had never been entered.

We conclude, therefore, that the court is without power to interfere with the decrees against the protest of the only parties affected by them or having an interest therein. The alternative writ should be made peremptory, and it is so ordered.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8767B. Department One. June 2, 1910.]

In the Matter of the Estate of Benjamin G. W. Lichtenberg, *Deceased.*

S. Newton Leo *et al.*, *Appellants*, v. Benjamin Lichtenberg, *Administrator, Respondent.*[1]

Executors and Administrators—Allowance for Services—Investigating Claims. It being the duty of an administrator to investigate and report upon all claims of creditors of the estate, an administrator is entitled to an allowance for attorney's fees required for the investigation of a third person's claim to ownership of a half interest in the estate which was based upon mutual accounts and dealings between the deceased and his brother for whom it was alleged deceased held the property in trust; since investigation might prove the claimant to be a creditor, and since the law takes an interest in distributing the estate to the legal heirs.

Same—Allowances—Attorney's Fees — Amount — Discretion. Allowances to administrators for attorney's fees are largely discretionary, and no abuse of discretion appears, considering the value of the estate and all the circumstances, where $1,500 was allowed for the probating of a will and investigating a third person's claim to a half interest in an estate of the value of $62,860, the attorneys having examined books and correspondence, and consulted with New York counsel for claimant during a period of a week or ten days.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Court Commissioner, entered December 24, 1909, approving the final account of an executor, and allowing attorney's fees, after a hearing before the court. Affirmed.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellants.

Godman & Embree, for respondent.

Morris, J.—Benjamin G. W. Lichtenberg, at the time of his death, was a resident of New York. He left a will, by the terms of which appellants were nominated executors and

[1]Reported in 109 Pac. 48.

trustees. The will was admitted to probate in New York, and deceased having acquired real property in Seattle, the will was in due time admitted to probate in King county, and Benjamin Lichtenberg appointed administrator with the will annexed. He qualified and proceeded to administer upon the estate in King county, the value of which estate is returned at the sum of $62,860. Upon the filing of his final account as such administrator, he asked for an allowance as attorney's fees, which was granted after a hearing, and the sum fixed at $1,500.

The services rendered by the attorneys were such services as are usually incident to the probating of a foreign will, and such as would ordinarily be required in the administration of an estate of this character and value. In addition, the widow of a deceased brother of decedent made claim to an undivided half of the King county property, asserting that deceased held the title to this property in trust for her husband, and in support of this claim, she produced certain account books and correspondence between the two brothers. This claim was investigated by the attorneys for the administrator, who examined the books and correspondence, and the matter was deemed of sufficient importance to call for a consultation with the New York counsel for appellants, and such consultation was held at Seattle during a period of a week or ten days.

Appellants suggest that the attorneys for the administrator are not entitled to compensation for their services in this regard, it being no part of the administrator's duty to settle or determine the estate as between rival claimants, and that, in case Mrs. Lichtenberg should seek to enforce any claim to establish her interest in the King county property, such proceedings would not be directed against the administrator, nor would he be required to defend as against such claim of interest. Doubtless most of this contention is correct, but it does not necessarily determine the question. It is, by statute, made the duty of the administrator to investigate

and report upon all claims of those claiming to be creditors of deceased, and to advise the payment of all such claims as appear to be just and proper, it being the declared policy of the law that the rights of creditors are superior to those of heirs. And while a claimant to ownership of any part of an estate is in no sense a creditor of the estate, yet where the claim is made, based upon mutual accounts and dealings between the deceased and the claimant, it might be that the investigation of such accounts would show an indebtedness of the estate growing out of the transactions relied upon to establish the alleged interest. We do not know what the nature of Mrs. Lichtenberg's claim was, nor how she sought to evidence it, other than that she produced account books and correspondence for the examination of the administrator and his attorneys. That the matter was deemed of some importance is apparent from the fact that the New York counsel for appellants consulted with the attorneys of the administrator, doubtless for the purpose of determining what would be the attitude of the estate toward such claim.

Ordinarily the only services for which an administrator or executor will be allowed are such as are beneficial to the estate. This, however, does not mean that, when the result of services undertaken in good faith is not of pecuniary or other benefit, but rather results in loss, such services should be disallowed. 11 Am. & Eng. Ency. Law (2d ed.), 1242; *In re Statler's Estate, ante* p. 199, 108 Pac. 433. The law takes an interest in distributing an estate to the proper and legal heirs. Thus, if it should appear that persons not recognized in the will as such should claim to be children of a testator, and thus entitled, if asserting a true claim, to the same distributive share of the estate as if the will had not been made, would it not be the duty of an executor to make some investigation into such a claim, and would any court refuse a proper allowance for services of attorneys who might be called upon to aid him? We think not. And yet it might be as well said in such an instance as

now contended by appellants, that the only interest of the executor was to conserve the estate for the benefit of those to whom it might finally be distributed. We are, therefore, of the opinion that the services rendered the administrator in the investigation of Mrs. Lichtenberg's claim are a proper charge against the estate.

The proper fee to be awarded attorneys in probate proceedings is a difficult matter to be determined. So many things enter into such a consideration that no rule or standard can be laid down which will alike fit all cases, or by which the value of such services can be measured. Hence, it is one of those matters that must rest largely in the sound discretion of the trial court, and which should not be interfered with upon appeal, except for a manifest abuse of such discretion. Such we believe to be the general rule. The sum awarded in this instance was a liberal allowance, but considering all the circumstances as detailed by the record, and the value of the estate, which we have held to be a proper matter of consideration in fixing attorney's fees, we cannot say there has been such an abuse of discretion as to call for interference on our part.

The judgment is affirmed.

Rudkin, C. J., Chadwick, Fullerton, and Gose, JJ., concur.

[No. 8741. Department One. June 2, 1910.]

H. G. LAZELLE *et al.*, *Respondents*, v. EMPIRE STATE SURETY COMPANY, *Appellant*.[1]

PRINCIPAL AND SURETY—BUILDING CONTRACTS—CONTRACTOR'S DEFAULTS—BONDS. Deviations from a contract in minor details and mistakes of the contractor, which are corrected on calling his attention thereto, do not constitute defaults, within the meaning of a building contract requiring written notice of default to be given to the surety on the contractor's bond, no loss having been sustained by the owner.

SAME—NOTICE OF BREACH OF CONTRACT—NECESSITY. The surety on a contractor's bond cannot complain of failure to give written notice of defaults by the contractor, within the time required by the contract, where no loss or substantial damage resulted therefrom, and notice was given in ample time to enable the surety to protect itself.

SAME—EVIDENCE OF DAMAGE—CERTIFICATE BY ARCHITECT. The architect's certificate of the cost to the owners of completing a building after the contractor's default is admissible to prove the damage, in an action against the contractor's surety, where the building contractor stipulated that the architect should audit the cost and that his certificate should be conclusive.

Appeal from a judgment of the superior court for King county, Main, J., entered January 4, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

John P. Hartman, for appellant.

Caldwell & Riddell, for respondents.

MORRIS, J.—Action upon bond, to recover for breach of building contract. Judgment for plaintiffs, and the surety company appeals.

The respondents alleged a breach of the contract in three particulars: Failure to supply proper material, furnish competent workmen, or to prosecute the work with diligence. The answer contained nothing other than denials. The

[1]Reported in 109 Pac. 195.

errors complained of are: Failure of the evidence to show notice to the surety within the limitation of the bond; taking possession of the building and ousting the contractor, and failure in proof of damages. The provision of the bond as to notice required written notice of the contractor's default, with a verified statement of particulars, to be delivered at the home office of the surety within fifteen days. The contract provided for the completion of the building on January 8, 1909. There was no demurrage clause, nor was time made of the essence. It not being completed on January 21, due notice was given to the surety, and on February 4, nothing having been done by the company, personal notice of the default was given to the Seattle agent of the company. The appellant then executed a written waiver of the requirement for delivery of notice at the home office, and agreed to accept notice at the Seattle office; and on February 11, following this waiver, the respondents in the meantime having made several complaints of the manner in which the work was being done, the unskillfulness of the workmen, and the poor quality of the material, the respondents requested appellant to take charge of the work and complete the contract. This was refused.

The next day the architects gave respondents a certificate, to the effect that the contractor had failed to comply with the contract in the particulars complained of by respondents, and gave it as their judgment that, because of these defaults, the owner was justified in terminating the contract and taking possession of the building. This certificate was in accordance with a stipulation in the contract. The respondents served a copy of this certificate upon the contractor, with a further notice that in three days they would take possession. Copies of the certificate and notice were also served upon the appellant on February 13, and on February 16 respondents mailed a verified statement of the particulars in which he claimed default to the home office of the appellant. On February 22 a further written statement was mailed,

notifying the surety company of the payment of the indebtedness against the building created and unpaid by the contractor. Respondents then took possession of the building and completed it, and on July 19 the architects gave a certificate in which they certified the cost to the owner by reason of the contractor's default. By December 1, the owner knew of instances in which the contractor was avoiding the contract in some minor details. In that month it was noticed that he had arranged the second story of the dwelling so that the roof would be too high, and his attention being called to the mistake, he was required to rectify it. None of these particulars are complained of by respondents; nor is there any claim of damage because thereof. The appellant, however, contends that these defaults constituted breaches of the contract, and that it was entitled to notice within fifteen days, and is now released because of the failure to give such notice.

It has never been held that, every time a contractor put in a defective board which was changed, on his attention being called to it, or sometimes sawed a timber off too short, or cut his joist too long, or erred in other minor details which on notice were all corrected, these constituted such breaches of the contract as would relieve a surety not receiving notice. In building contracts substantial compliance is the requirement, and it may be assumed that, from time to time as the work progresses, there will be technical violations of the specifications which will require correction. Yet to hold that these were breaches of the contract, requiring notice, no loss having been sustained by the owner, would be a strict interpretation of the contract never followed by this court. The notice provision is inserted for the benefit of the surety. It is to give him notice of the doing or neglecting to do something by the contractor which will result in loss to the owner primarily, and thus subject the surety to a liability. And since the purpose of the provision is protection to the surety, when it appears that notice is given in ample

time to enable the surety to protect itself against loss or damage, it is sufficient, since it has accomplished that which it was the intent of the notice to accomplish. Hence, the rule has been established that the surety cannot complain when it can show no loss or substantial damage by reason of the failure to receive notice, in the exact and technical language of the contract, or make it appear that its failure to receive notice has prevented it from taking proper steps for its protection. *Ovington v. Aetna Ind. Co.*, 36 Wash. 473, 78 Pac. 1021; *Heffernan v. United States Fidelity & Guaranty Co.*, 37 Wash. 477, 79 Pac. 1095; *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541; *Martin v. Empire State Surety Co.*, 53 Wash. 290, 101 Pac. 876. The appellant interposed no defense of any loss it had suffered by what it claimed the lack of notice; it made no attempt to show anything it might have done to protect itself had it sooner known the character of the work, material, and workmen furnished under the contract; and since the damage complained of by the respondents would have been spared them had appellant acted when it did receive notice, we cannot find any prejudicial loss to appellant in this assignment of error.

All that need be said concerning the next assignment is that the evidence amply justified the giving of the certificate by the architect, and under the contract its receipt by the respondents was a justification for them to proceed as they did. In this regard, due notice of the fact was given appellant, and it had ample opportunity to take charge and save respondents and itself from further loss.

As to the next assignment, the contract provided that, in case the owner should be compelled to take charge of the building and finish the contract, the cost should be audited and certified by the architects, and such audit and certificate should be conclusive upon the parties. Such stipulations are usual in contracts of this character, and the courts recognize the same binding force of the agreement made by the parties in this respect as in any other. Having stipulated

that such certificate should be conclusive, it cannot now be said it was inadmissible or incompetent to prove the damage to the owner. *Eldridge v. Fuhr*, 59 Mo. App. 44; *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347; *Charlton v. Scoville*, 144 N. Y. 691, 39 N. E. 394.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8633. Department One. June 2, 1910.]

THE CITY OF TACOMA, *Respondent*, v. J. E. BONNELL *et al.*, *Appellants*.[1]

EMINENT DOMAIN—PARTIES DEFENDANT—SEPARATE TRIALS—DISCRETION—ABUSE. In eminent domain proceedings by a city, all the owners may be joined as defendants, and abuse of discretion in refusing one a separate trial does not appear unless he is deprived of a fair trial and makes an affirmative showing of prejudice.

EVIDENCE—OPINIONS—VALUE OF LAND. Evidence of the value of property is not objectionable as based upon what land was offered for, where the witness stated that he based his opinion on not only property he had for sale there, but other properties in the vicinity and in a general way, the witness having duly qualified.

EMINENT DOMAIN—DAMAGES—ASSESSMENT—STATUTES—CONSTRUCTION. In eminent domain proceedings by a city, the jury is to determine only the damage to the land taken and the damages resulting to land not taken, although the court, in the language of Rem. & Bal. Code, § 7782, instructed them to further find the "gross damages" to any land or property not taken (other than damages to a remainder, by reason of its severance from the part taken), since this covers the same thing or is meaningless.

SAME—DAMAGE TO BUILDINGS—INSTRUCTIONS. In eminent domain proceedings, it is not error to fail to instruct the jury as to damages which the owner might suffer if a building on the premises were removed, where the matters were covered by the general instructions.

SAME. It is not error prejudicial to the owner to instruct the jury that they should determine the value of a building and add

[1]Reported in 109 Pac. 60.

its cost to its removal, if it was damaged by its removal and could not be put in as good condition as before, although the instruction goes beyond Rem. & Bal. Code, § 7777, which provides that if the building is taken so that it cannot be readjusted to the premises, the measure of damages is its fair market value; since it was error favorable to the owner.

SAME—"TAKING OF PROPERTY"—MEASURE OF DAMAGES—REMOVAL OF BUILDING. Rem. & Bal. Code, § 7777, providing that, if a part of the building is taken or damaged and the building can be readjusted or replaced on the land remaining, the measure of damages to the building shall be the cost of removing it, is constitutional, it being within the power of the legislature to provide that such a removal is not a taking of property, where there was but one tract of land involved.

APPEAL—REVIEW—VERDICT. The verdict of a jury will not be overruled because of conflict in the evidence.

EMINENT DOMAIN—DAMAGES—EVIDENCE—VALUE OF LAND. In eminent domain proceedings, where all the witnesses testified as to the value of the property as it was at the time of the trial, it will be presumed that the verdict included the value of cement walks that had been laid, and it is not error to exclude evidence of the cost of the walks.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered October 21, 1909, upon the verdict of a jury assessing damages in a proceeding to condemn land for public improvements. Affirmed.

A. R. Titlow and *Lorenzo Dow*, for appellants.

T. L. Stiles, *F. R. Baker*, and *F. A. Latcham*, for respondent.

CHADWICK, J.—This is an appeal from an award of damages under the statute authorizing cities of the first class to condemn property for public improvements. The jury rendered a verdict in form as follows:

"We, the jury in the above entitled cause, duly empaneled and sworn to try the issues herein between the petitioner and the several defendants do find and adjudge that the following sums be allowed to the several defendants for the value of lands taken, for damages to remaining lands not taken,

for damages by reason of proposed street grade, and for cost of removing buildings.

"14th. To the defendants James E. Bonnell and Mrs. James E. Bonnell, his wife, as the record owners of lots 17 and 18, block 5, Van Dusen's Addition to Tacoma,

For value of land taken.....$1,500.00
For damage to remaining land by reason of severance 100.00
For cost of removing residence building.....
For value of residence building..... 500.00
For cost of removing store building..... 500.00
For value of store building.....

————————————, Foreman."

Numerous errors are assigned, the first being that the court abused its discretion in refusing to grant these appellants a separate trial or a trial with another defendant who had improved property, and in refusing to make divisions or separate groups of defendants in lesser numbers than the whole. The case is in the usual form, fifty-six parties being made defendants. The statute (Laws 1907, p. 316; Rem. & Bal. Code, § 7768 *et seq.*) has authorized the proceeding complained of, and we cannot say that the discretion of the court has been abused, unless it be made to appear that a party has been deprived of a fair trial. He must make an affirmative showing of prejudice. *In re Western Avenue*, 57 Wash. 290, 106 Pac. 901. No such showing is made in this case.

It is next contended that one "H. B. Ritz was permitted to testify concerning the value of appellants' land, his opinion being based upon what land had been offered for." The evidence in that regard follows:

"Q. Counsel asked you if you had made any sales, and you replied that you had property for sale in that portion of the city. Did you base your judgment upon the values placed upon the property which you had for sale and your efforts to sell the same in the open market? Mr. Titlow. We object to that as not competent; not the proper test. The Court. I will overrule the objection. To which ruling of the court counsel for defendants Bonnell and wife duly

excepted. Exception allowed. A. Why, I base my opinion on not only property I have for sale there, but other properties in that vicinity in a general way."

Taken as a whole, we find no merit in this assignment.

The witness had qualified himself, and had on direct examination given his opinion as to the value of the property. The record does not show any sales in the immediate vicinity of the property sought to be condemned, and all the witnesses, for both the petitioner and the defendants, expressed a general opinion as to values.

The court instructed the jury practically in the language of the statute, which reads as follows:

"(1) The value of land taken at date of trial;

"(2) The damages which will accrue to the part remaining because of its severance from the part taken, over and above any local or special benefits arising from the proposed improvement. No lot, block, tract or parcel of land found by the court or jury to be so damaged shall be assessed for any benefits arising from such taking only.

"(3) The gross damages to any land or property not taken (other than damages to a remainder, by reason of its severance from the part taken), and in computing such gross damages shall not deduct any benefits from the proposed improvement. Such finding by the court or jury shall leave any lot, block, parcel or tract of land, or other property subject to assessment for its proportion of any and all local and special benefits accruing thereto by reason of said improvement." Laws 1909, p. 723, § 1 (Rem. & Bal. Code, § 7782).

It is insisted that the form of verdict makes no provision for the so-called "gross damages." It is true that the verdict does not, but we are at a loss to know what damages could be included therein if it had so provided. When the jury had determined the damages for the land taken and then the damages resulting to the property not taken, it has done all that it could do, and while the trial court was perhaps justified in submitting the third item to the jury, for it is, as we have said, in the statute, we confess our in-

ability to fathom the intention of the legislature in adopting the third clause in the section quoted. "Damages which will accrue to the part remaining" and "the gross damages to any land or property not taken," are one and the same thing, and the parenthetical clause, "other than damages to a remainder by reason of its severance from the part taken," must mean, if it means anything, that the damages to the remainder shall be assessed as an item separate from the sum allowed for the land actually taken. This the jury did. If that is what it means, there is no error in the verdict or instruction. If it does not mean that, it is meaningless, and no wrong results to the appellants by reason of the failure of the verdict to specify "gross damages."

It is next contended that the court erred in that he did not instruct the jury as to the damages the appellants might suffer if the larger building situate on the premises taken were removed and placed on a different street, causing a change of frontage and the sacrifice of an ell and stairway. These matters were all covered by the general instructions, and were undoubtedly considered by the jury, so that the verdict is conclusive.

It is further urged that the court instructed the jury that, if they believed that by the removal of any building to an adjacent property the building will be damaged and cannot be put in as good condition as it was at the time of the trial, they should determine the value of the building and add its cost to its removal. There is no error in this instruction, although it may go beyond the statute (Laws 1907, p. 319, § 10; Rem. & Bal. Code, § 7777), wherein it is provided that, if the entire building is taken so that it cannot be readjusted to the premises, the measure of damages shall be the fair market value of the building. The fact that the court in submitting this hypothesis to the jury in effect instructed them that, if the building could not be put in as good condition as at the time of the trial, they should find and add the cost of removal to the value of the

building, is in favor of the appellants, and would not be prejudicial. The testimony was full and fair upon the damages done to the buildings and the possibility of removal as well as the changed frontage of the buildings. We must, therefore, conclude that all resultant damages were included in the verdict of the jury.

The question is also raised that section 10 of the act which provides that, if a part of the building is taken or damaged and the building can be readjusted or replaced on the land remaining, the measure of damages to the building shall be the cost of readjusting or moving it, is unconstitutional. It is said that, if the city takes property, it must pay its full value. In the case of *In re Jackson Street*, 47 Wash. 243, 91 Pac. 970, a distinction between a taking and damaging is noted, and we conceive it to be well within the power of the legislature to provide that when it is possible to remove a building so it can be readjusted to the premises not taken, it shall not be a taking within the meaning of the constitution. The statute goes no further than to require the removal to the part of the particular tract that is not taken, and the public pays the cost of removal. It might be that there would be no authority for an act requiring a property owner to remove a building to some other tract of land; but where there is one distinct tract and the building may be removed from one part of it to another without destroying the structure, no constitutional right is violated.

It is contended that the verdict is contrary to the evidence. We find that there is evidence to sustain the verdict and, although a larger verdict might have been returned under appellants' testimony, we are not justified in overruling the verdict of the jury because of the conflict of evidence. Nor do we find any warrant in the record for appellants' insistence that the city conceded the values and damages fixed by appellants' witnesses.

Appellants' last contention is that they should have been

permitted to show the cost of the cement sidewalks which had been previously laid on three sides of the property. All of the witnesses testified as to the value of the property as it was at the time of the trial, and we find nothing in the record that would indicate that the estimates were made without reference to existing conditions. We must infer, then, that this item was included in the general verdict.

Finding no reversible error, the judgment is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8847. Department Two. June 2, 1910.]

A. J. OLSON, *Appellant*, v. TITLE TRUST COMPANY, *Respondent*.[1]

JUDGMENT—RES JUDICATA—BAR. A judgment in an action by a vendor to cancel a land contract and forfeit the purchase money paid and quiet the vendor's title, in which the defense was presented that the contract was procured by fraud, is *res judicata* and a bar to a subsequent action brought by the vendee against the vendor to recover the purchase money; since the issue of plaintiff's right to rescission for fraud was, or might have been, litigated in the former action.

Appeal from a judgment of the superior court for King county, Main, J., entered March 15, 1910, upon sustaining a demurrer to the reply, dismissing an action for money had and received. Affirmed.

O. L. Willett, for appellant.

Lyter & Folsom, for respondent.

MOUNT, J.—The appellant brought this action to recover upon fourteen alleged causes of action, for money had and received by respondent. Twelve of these causes are upon assigned claims. The respondent answered the complaint,

[1]Reported in 109 Pac. 49.

and admitted that it had received the money, but denied any indebtedness to the plaintiff. It is alleged further that all differences between the plaintiff and the defendant had been adjusted in a former action brought by the respondent against the plaintiff, and the facts and the record in the former action were set out in the answer. To this answer the plaintiff filed a reply admitting a former action, but alleged that the contract upon which that action was based, and which that action was brought to forfeit, was obtained by fraud. To this reply the respondent filed a demurrer, which was sustained by the lower court. The plaintiff refused to plead further and the action was dismissed. Plaintiff appeals.

It is conceded that the facts are, in substance, the same for each cause of action, and that it is necessary to consider only the first cause and the answer and reply relating thereto. The first cause of action alleges that the defendant received $835 on December 18, 1906, and $49.95 on May 31, 1907, which money is the property of the plaintiff, and is due and owing by the defendant to plaintiff. The answer denies this allegation and alleged affirmatively that, on November 6, 1906, defendant and plaintiff entered into a memorandum agreement, by which plaintiff agreed to purchase from defendant lot 11, block 1, of Delmar Park, a proposed addition to the city of Seattle, for an agreed consideration of $2,500, a part of which, viz., $250, was then paid to defendant; that this memorandum agreement provided for a subsequent contract; that thereafter, on December 15, 1906, pursuant to the memorandum agreement, a new contract was executed, and thereupon the plaintiff paid an additional sum of $585 upon the purchase price of said lot; that these two items constituted the sum of $835 referred to in the complaint; that the said contract acknowledged the receipt of the money as earnest money in part payment for said land, and provided that the balance of the purchase price should be paid in two equal installments,

with interest at six per cent after December 16, 1906; that the contract further provided that, in default of the payment of principal or interest due, the defendant might declare the contract terminated and all sums paid thereon forfeited to defendant as liquidated damages (a copy of the contract is annexed to the answer and made a part thereof); that the item of $49.95 mentioned in the complaint was received by the defendant on May 31, 1907, as interest due under the terms of the contract; that thereafter on September 21, 1907, this defendant commenced an action, which is referred to as No. 57,805, against the plaintiff in the superior court of King county, alleging that this plaintiff had failed to comply with the terms of said contract, and had failed to pay the installments due on December 15, 1906; and in that action this defendant prayed that its title to the land be quieted, and that said contract and all moneys paid thereunder, being the money mentioned in plaintiff's first cause of action, be adjudged forfeited to the defendant; that this plaintiff appeared in said action and answered, setting up various defenses—among others, that the plaintiff had been by fraud induced to sign said contract, and prayed for damages by reason of such alleged fraud; that thereafter, upon issues joined, the cause was tried upon its merits, and on December 4, 1908, a judgment was rendered therein in favor of this defendant; that said judgment granted the prayer of the complaint, to wit, a forfeiture of said contract and all moneys paid thereunder, and quieted title to the said land; that said judgment and decree was duly filed on the 9th day of December, 1908, that no appeal has been taken therefrom, and that the same is in full force and effect; that the issues in that action were the same as are now presented in this, and that such judgment is a bar to this action. A copy thereof is attached to the answer. The plaintiff, for reply to this affirmative defense, did not deny any of the allegations thereof, but pleaded that the lot he intended to purchase was not the lot described in said con-

tract, and that he was induced to enter into the said contract by false and fraudulent representations.

Several questions are argued in the briefs, but the question of *res adjudicata* so clearly determines the case that we shall not discuss any other. Cause No. 57,805 was brought by the respondent for the purpose of terminating the contract therein referred to, and of forfeiting the money paid thereon, and of quieting title of respondent against the claim of the appellant. Several defenses were attempted to be made to that action, one of which was that the contract was procured by fraud. Upon a trial of the issues in that case, the court found in favor of the appellant, and recited in the judgment: "and the court, having considered the allegations of the complaint and the answer and the testimony submitted at the trial and the argument of counsel thereon, finds that the allegations of the complaint are true and that the plaintiff is entitled to the relief prayed for in his complaint." Then follows a decree quieting title in the respondent.

It is not disputed that the money in controversy in this action was paid to the respondent for the lot which appellant was seeking to purchase by the contract in controversy in that action. Whether the money was paid upon the contract or for the land is immaterial. The money was paid by virtue of that contract, and the action brought by this respondent was for the purpose of enforcing the provisions of that contract, among which was the forfeiture of the money now in controversy as provided in the contract. That was one of the issues. It is plain that, if the right to forfeit this money was not litigated in that action, it should have been, and the rights of the parties thereto finally determined. The rule is that, in an action between the same parties, a judgment therein is *res adjudicata* as to all points in issue, and also all points which might have been raised and adjudicated. *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137; *Isensee v. Austin*, 15 Wash. 352, 46 Pac. 394;

Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515.

In *Isensee v. Austin*, *supra*, this court quoted the general rule as stated in Black on Judgments, and then said:

"If the parties of the second part to this contract had a right to plead overpayment by reason of their subrogation to the rights of the trust company, that right existed in the action between appellants and Stenger and should have been there adjudicated. In that suit the contract was canceled. If there was any reason why the contract should not be canceled and if the defense urged here could be substantiated, it should not have been canceled, and that defense should have been urged in the former trial, and, not having been urged, it is lost."

The same is true in this case. If the contract in case No. 57,805 was not a valid or binding contract for any reason, that fact should have been pleaded and shown in that action, so that the appellant here might have had a rescission and the return of his money. That issue was presented, and the court there found that the contract was a valid one, and adjudged a forfeiture under its terms. It is sought now to try the same question over again in this action, by alleging other facts in reply to the answer. This clearly may not be done.

The judgment of the lower court must therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8356. Department One. June 2, 1910.]

SULTAN RAILWAY & TIMBER COMPANY, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

CARRIERS—GOODS—CONTRACTS—CONSIDERATION. Where a logging company was insisting upon its right to cross a railway at grade, which was objected to by the railway company, and the parties entered into negotiations to adjust their respective rights, and by mutual concessions reached an agreement in which all their differences were settled by the railway company's agreeing to carry logs at a certain rate, the agreement was intended as, and had all the essential elements of, a contract.

SAME—CONTRACTS—MUTUALITY. An agreement by a railway company, to carry at a certain rate, all of the logs that a logging company should tender for carriage, is not void for lack of mutuality, where there was an independent consideration in that the logging company forbore its right to cross the railway at grade, so long as the rate was continued, although there was no agreement to ship any quantity of logs.

SAME—CONTRACTS—CONSIDERATION—DISPUTED CLAIMS. A logging company's forbearance of a right claimed by it to cross a railway at grade constitutes a sufficient consideration for a contract by the railway company to carry logs at a certain rate, whether the claim for the grade crossing was well founded or not, where the parties treated it as a right and contracted with reference to it.

SAME—CONTRACTS—CONSTRUCTION. A letter by a railway company to a logging company agreeing to carry "your" timber at a certain rate, will be construed to refer not only to timber owned by the logging company at the time, but to any tributary timber which it might tender for carriage, where the same was under discussion at the time the negotiations were carried on between the parties, and the logging company made known its purpose to acquire such other timber.

SAME—DISCRIMINATION—CONTRACTS—VALIDITY. The law prohibiting discrimination between shippers is not violated by a contract of a railway company to carry the logs of a logging company between certain points at a specified rate, where part of the consideration therefor was the logging company's forbearance of the right to cross the railway at grade; and such contract is not void as against public policy.

[1]Reported in 109 Pac. 320, 1020.

SAME—DISCRIMINATION—STATUTES—CONSTRUCTION. The railway commission law, Rem. & Bal. Code, § 8627 *et seq.*, prohibiting discrimination between shippers by common carriers, does not prevent a railway company from entering into a contract with a shipper to carry particular goods at a fixed rate for a given time, or to the amount of a given quantity.

SAME—EVIDENCE OF DISCRIMINATION. The fact that a railway company's published tariff of rates is greater than the amount agreed upon between the railway and a logging company for the carriage of its logs is not conclusive evidence that the latter is discriminatory, where an independent consideration passed between the parties in addition to the rates charged.

SAME—DEGREE OF PROOF. Where a railway company seeks to avoid a contract to carry goods on the ground that the same is void as against public policy, it must, as between itself and the carrier, establish the invalidity by direct evidence of the fact.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 28, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

F. V. Brown and *Frederic G. Dorety*, for appellant.

Benjamin S. Grosscup and *William C. Morrow*, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover damages for a breach of contract. The action was tried in the court below by the judge sitting without a jury, and resulted in a recovery by the respondent. This appeal was taken therefrom.

The facts material to an understanding of the controversy are, in substance, these: The appellant is a common carrier of both intrastate and interstate commerce. The respondent is engaged in the business of logging. For sometime prior to the month of April, 1903, the respondent had logged in the vicinity of what is now Sultan Junction. At that date it owned a considerable body of timber in that vicinity, the logs from which it was marketing by bringing them down

on skid roads to the Skykomish river from whence they were rafted to the city of Everett, where the principal market was found. The motive power used to drag the logs along the skid road was furnished by stationary donkey engines. After the logs were brought to the skid road from the place where they were cut, the nearest donkey engine would send out its cable and drag them along until they could be reached by the cable of the next engine, which in turn would drag them to the next one, and so on until they reached the dumping grounds on the bank of the river. As the timber was logged off, the line of haul lengthened, requiring the repeated installation of additional donkey engines, as the distance that could be covered by one ranged from but one-half to three-quarters of a mile.

In April, 1903, the respondent found it necessary to change its method of hauling, and conceived the idea of laying rails on its skid road and using a locomotive engine to haul its logs. Its skid road crossed the appellant's railway track at grade, and to make the required change, it was found to be necessary to cut the track at the place of crossing and put in the customary frogs and other protective devices usually found at railroad crossings. The respondent thereupon applied to the appellant for the privilege of putting in a crossing at grade, when it was informed by the railroad company that a grade crossing was inadvisable, and that the respondent must find a crossing either above or below grade. An over or under crossing was found not to be feasible, and various plans were suggested by the respondent to overcome the appellant's objection to a grade crossing, none of which proving acceptable, the respondent threatened to avail itself of the courts with the view of forcing a crossing. About this time the appellant's traffic manager approached the officer of the appellant and inquired what rate of carriage they would deem sufficiently attractive to induce them to discontinue hauling logs across the appellant's tracks, and to market them by way of the appel-

lant's road instead. Negotiations were thereupon taken up along this line, which were participated in by a number of the managing and traffic officials of the appellant's road, during the course of which the respondent informed them fully of its then timber holdings, of the timber on which it held contracts of purchase and of other timber tributary to that point of shipment which they expected to procure, as well as the additional cost and expense it would be put to in order to change its system of logging to make it fit the changed conditions; among which was the fact that it would have to lessen the grades and lengthen the curves on its existing road, and place thereon heavier rails and construct more substantial bridges than would be necessary were it to pursue the method of logging it originally had in view.

Particular inquiry seems to have been made by the railway officials as to the volume of traffic the railway might expect from that source, and they were told that it would take from fifteen to twenty years to finish logging the timber tributary to the railway at that point. The railway company finally proposed to haul the respondent's logs from Sultan Junction to Everett at a rate of $1 per thousand feet, board measure, with an estimated equivalent weight basis of twenty-five cents per ton, until a permanent weight basis could be arrived at by weighing the logs for the first few months of hauling. This proposition was accepted by the respondent, whereupon the appellant, through its assistant traffic manager, wrote the respondent's president the following letter:

"Seattle, Wash., April 26, 1904.

"Mr. U. K. Loose, President,
"Sultan Railway & Timber Co.,
"Snohomish, Washington.

"Dear Sir: Referring to the matter of hauling your timber from Sultan Junction to Snohomish, Everett, Union Slough and Marysville. The understanding reached between you, Mr. Ward and myself at the discussion we had in Mr. Ward's car on Friday, April 22nd, is, until a permanent weight basis can be arrived at by weighing the cars

for the next few months, that the logs shall be handled as follows:

"A charge of 25 cents per ton with a minimum of 50,000 lbs. per car, will be made; you to furnish certified copies of Official Scaler's report of logs hauled at the end of each month; and an adjustment of 'over or under' charges will be made so that the charge to you for hauling will not exceed $1.00 per thousand feet official scale with a minimum of 7,500 feet per car average for the month.

"A special switching charge of $3.75 per hour will be made where we are required to make more than one setting of cars; except that we will give one hour's time of the switch engine in spotting cars at your unloading works.

"You are to take empties and deliver loads at convenient transfer tracks at Sultan Junction, and will keep the tracks, necessary for our engine to use, in such repair as to enable our trains to run over them with perfect safety.

"We will furnish bunks and attach same to cars assigned to your exclusive service; but in the event that cars are taken out of service on account of suspension of operations they are to be re-bunked by you; or, you will accept this company's bill for same.

"Cars used in your service will be subject to the usual rules of the Car Service Association.

"You are to assume ordinary responsibilities assumed by railways interchanging cars as covered by rules of the American Railway Association.

"Your company to load and unload the logs and assume responsibilities for damage to cars in doing so.

"The instructions to cover our understanding of the terms under which your logs are to be hauled by contract were received from Mr. J. W. Blabon, our Fourth Vice President; and although Mr. Ward said that he did not care about a contract, it may be that Mr. Blabon will still wish to have one executed; in the meantime, however, I will issue instructions to our agents to handle the business as outlined above. Yours truly, Jno. C. Eden,

"Assistant General Traffic Manager."

The parties continued under the arrangement outlined in the letter until March 1, 1906, when a weight basis for charges at the rate of twenty-four cents per ton was agreed

upon in place of the charge based on board measure. Shipments were continued on the weight basis until June 29, 1907, when the appellant notified the respondent that the rate arranged for in the foregoing agreement would be canceled on August 31, 1907, and that thereafter the respondent would be required to pay for shipment of its logs between the points named at a rate of sixty cents per ton, or $2.50 per thousand feet board measure. Subsequent to the time the rate was agreed upon and prior to the time it received notice of the cancellation of the contract, the respondent expended in changes and extensions of its logging road the sum of sixty thousand dollars.

After the cancellation of the agreed rate, the railroad company published and posted and filed with the state railroad commission a rate or tariff sheet, showing a rate for logs between Sultan Junction and Everett of $2.50 per thousand feet, board measure, or its equivalent on a weight basis of sixty cents per ton. There is, however, no evidence in the record, further than the fact of the adoption of the published rate, tending to show what is a just and reasonable rate for the transportation of logs between the points named. The respondent in its evidence did not touch on the question, and the railroad company offered no evidence on any of the matters in dispute, but accepted the evidence of the respondent's witnesses as true. After the adoption of the published rate, the respondent tendered to the appellant for shipment certain logs, cut, however, from timber purchased by the appellant subsequent to the time the contract was entered into, at the contract rate, tendering it at the same time the freight charges thereon at the rate of twenty-four cents per ton. The shipment was refused by the railway company at any less rate than the published rate. The respondent thereupon began this action, with the result as before stated.

The appellant's first contention, stated in the language of its learned counsel, is this:

"The parties to the transaction in question here never intended to assume binding obligations or do more than adopt a mutually satisfactory working arrangement which the self-interest of both parties would enforce. But, even had they desired to assume contractual obligations, they would have failed in this instance, because there was no mutuality, since there was no agreement by the logging company to ship any particular quantity of logs, and no other consideration was given for the contract, since the logging company's forbearance to force a grade crossing was not in accordance with any promise, but was at all times voluntary on their part, and was not obligatory upon them."

But as we view the record these contentions are not tenable. That there was a contract and an intent to contract we think there can be but little question. The situation then confronting the parties was one in which both had rights. The appellant, because of its vast passenger and freight traffic, had the right to insist that the respondent, if it crossed its tracks, do so in such manner as would reduce the hazard to its traffic to a minimum; while, on the other hand, it was not in a position to insist that its railway line constituted a barrier across which the respondent could not go without its permission. It was to adjust these respective rights that the parties entered into negotiations, and when they did negotiate, and by mutual concessions reached an agreement in which all of their differences were settled, such agreement had in it all the essential elements of a contract.

We think, also, that there was no want of mutuality in the contract. It will be observed from the quotation made from the argument of counsel that it is thought the lack of mutuality lies in the fact that the respondent did not agree to ship any particular quantity of logs, and that it did not give up but only forbore its right to force a crossing at grade across the appellant's tracks. This latter part of this

contention we do think accords with the facts. As we view the record the respondent, not only forbore its attempt to force a crossing at grade, but agreed to so forbear as long as the appellant was willing to carry its logs at the rate of twenty-five cents per ton between the points named in the agreement; and this being so, the railroad can plead the agreement and its willingness to haul at the agreed rate as a defense to any action brought by the respondent to force a crossing for a logging railway at grade.

Nor was there a want of mutuality because there was no agreement to ship any particular quantity of logs. The contract, as we view it, was one by which the appellant promised to carry between the points named all logs that the respondent should tender it for carriage, be the same much or little. Such a contract, when founded upon a consideration independent of the mere promise to pay the contract rate, is not void for want of mutuality. It is this fact—the fact that there was an independent consideration—that differentiates the case at bar from the cases cited and relied upon in the appellant's brief. For example, in *Dennis v. Slyfield*, 117 Fed. 474, it was said by Judge Lurton, who pronounced the opinion of the court, that the writing entered into obligated only one of the parties thereto; that while it obligated the owners of the vessel to carry all lumber which the dealers might from time to time during the season deliver for carriage, it did not obligate the opposite party to deliver any lumber for carriage, or to do more, even by implication, than pay the prices named for carrying the lumber. So with the case of *Railway Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759. There the railway company agreed to carry corn between certain points at a certain price, but it did not obligate the other party to the contract to ship any corn, or do more than pay the contract price for such corn as he should ship. The same principle was involved in the cases of *Chicago and Great Eastern R. Co. v. Dane*, 43 N. Y. 240; *Louisville N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370,

3 Am. St. 674, and the cases cited in Page on Contracts, § 307. The contracts in these cases were held not binding for want of mutuality, because the promisee gave up nothing as a consideration for the promise. But, as we have shown, the fact is different in the case at bar. Here the promisee paid a consideration for the promise. It agreed, among other things, to abandon its claimed right to cross the appellant's tracks at grade.

In this connection, however, the appellant makes the contention that the respondent had no legal right to cross its track with a private logging road, and that in consequence it gave up nothing when it surrendered such claim of right. The case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, is cited as sustaining this contention, but we cannot think the case conclusive of the question. It is true we did there hold that a logging company performing no public function was without power to condemn a way for a logging road, notwithstanding the legislature had purported to confer on it that power, but the question of the right of a logging company to condemn for such a way when the way was one of necessity was neither presented nor decided. The constitution (art. 1, sec. 16), grants the right to take private property for private ways of necessity, and it was open to the respondent to claim that the conditions then existing presented a sufficient cause for the exercise of the right. It is not necessary now that we inquire how well founded was this claim. It is enough that the parties themselves treated it as a right and contracted with reference to it.

By referring to the letter before set out, it will be noticed that the writer of the letter, when speaking of the timber to be hauled under the contract, refers to it as "your timber." It is argued by the appellant that this phrase limits the timber agreed to be shipped to the timber owned by the appellant at the time the contract was entered into, which amounted to some fifty million feet, and that, since this was

all shipped before the alleged breach on the part of the railway, the contract has been performed. We think, however, the evidence makes it clear that the contract to haul did not refer to timber then owned by the respondent, but to such timber tributary to the junction named as the respondent should tender for shipment. This is made clear by what took place at the meetings of the parties while the contract was being negotiated. It is shown that at those meetings the entire matter was gone into; that the respondent not only made known its then holdings, and its outstanding contracts of purchase, but also its purpose to acquire other timber properties and continue its logging business at this point as long as it found it profitable, or until the tributary timber should be exhausted. When, therefore, the railway official used the terms "your timber" in setting out the contract, he must be held to have meant the timber concerning which the parties were negotiating, and not the specific quantity then owned by the respondent.

The last contention is that the contract is void as against public policy. The appellant argues that because the law imposes upon it certain conditions—for example, prohibits it from discriminating in its charges or facilities for transportation between places or persons in the transportation of freight or passengers; prohibits it from receiving from any person, either directly or indirectly, a greater or less compensation for services rendered than it charges or receives from any other person for doing a like or contemporaneous service; requires that its passenger and freight tariffs shall be fair, just, reasonable and sufficient; that it shall furnish to the state railroad commission and keep at each station, depot and office for inspection of all interested persons during business hours a complete schedule of all rates, rules, orders, classifications or regulations put in force by it between all points in this state—it is without power to enter into a special contract with an individual to carry freight for any given time at a particular rate. This, on the prin-

ciple, apparently, that, since it must grant to all the privileges it grants to one, a rule holding its contracts with reference to freight and passenger tariffs perpetual might result when conditions change in grossly excessive tariff rates to the general public or grossly unremunerative and destructive rates to the railroad company itself.

The acts of the legislature of this state establishing a railroad commission and providing for the regulation of freights and fares will be found in the statutes of 1905, p. 145, Laws 1907, p. 536, and Laws 1909, p. 191 (Rem. & Bal. Code, § 8627 *et seq.*). The acts are too long even to epitomize here, but it will be found upon examination that they do not in terms prohibit a railway company, except in certain specified cases, from changing or altering its tariff rates at any time it deems the reason sufficient, nor from entering into a contract with an individual shipper to carry particular goods at a fixed rate for a given time or to the amount of a given quantity. The prohibition is against discriminations, against the hauling of one man's goods at a more favorable rate than it will haul another's and against extortionate and unreasonable charges, but it does not purport to prohibit the railway company from giving a shipper a binding assurance that tariff rates on a given commodity will not be changed before the end of a fixed period, or before a given commodity has been shipped. The effect of the statute in this respect is similar to that of the interstate commerce act concerning which the supreme court of the United States in *Cincinnati etc. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, said:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the neces-

sities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

It is true that in a certain sense there are three parties to contracts of this nature, the carrier, the shipper, and the state. The interest of the first two is at once apparent; that of the latter consists in seeing that the contract is not discriminatory or oppressive on the shipper, or so far improvident on the part of the carrier as to impoverish it and thus prevent it from performing its functions as a carrier. But subject to these requirements we see no reason why the railway company may not now contract for the carriage of freights as freely as it was wont to do before the passage of the commission acts. The record fails to show that the contract in question is in any manner discriminatory or extortionate, or that it is unduly oppressive on the carrier. As we have said elsewhere, the record is silent on these matters, other than it was shown that the company had established a public rate between these points considerably higher than the contract rate. But this is not sufficient to justify the court in setting aside the contract rate on the ground of its inadequacy. While in a contract between the carrier and a member of the general public over the reasonableness of a freight charge it would be some evidence of the justness of the charge, conclusive perhaps in the absence of any other showing, to show that the rate exacted was the published rate and the rate charged every one for a similar service, it is not evidence when the purpose is to set aside a rate created by contract. As between the carrier and the other party to the contract the carrier must establish its claim of invalidity by direct evidence of the fact.

It is unnecessary in this proceeding that we consider the effect of the contract on rates to be charged to other shippers desiring to ship between the same points. Since the railway company is forbidden to discriminate in its charges between shippers, it could not, of course, charge other shippers a

greater rate than the contract rate for a like or similar service. But this does not necessarily mean that the rate charged must be the contract rate. It will be remembered the respondent, as an inducement to the contract, surrendered a right, and it may be that the value of the surrendered right can be taken into consideration in fixing the public rate, but this question we expressly refuse to decide.

Of the cases consulted we will specially refer to one only, namely, the case of *Alabama etc. R. Co. v. Mississippi Railroad Commission*, 203 U. S. 496. This case arose in Mississippi and the opinion of the state court is found in *Alabama etc. R. Co. v. Mississippi Railroad Commission*, 86 Miss. 667, 38 South. 356. The facts were these: The plaintiff railway company made what is called a "rebilling rate" of 3½ cents per 100 pounds on grain and grain products shipped from Vicksburg to Meridian, applicable, however, only to shipments into Vicksburg over a single road. Instead of being enforced solely as a rebilling rate, the Vicksburg merchant who received a carload of grain or grain products over the indicated road was permitted to either forward it over the plaintiff's road to Meridian or, at any time within ninety days in lieu thereof, send a similar carload, no matter whence received, from Vicksburg to Meridian at the same rate. The railroad commission of Mississippi, on complaint being made, entered an order declaring that all grain products shipped between these points should be carried at the rate of 3½ cents per 100 pounds. The railway appealed to the courts, complaining of the order on various grounds, among which was the ground that the rate fixed was unreasonable, because being below the actual cost of service. The supreme court of Mississippi affirmed the order, holding that the railroad company could not be heard to make the plea. This judgment was affirmed in the supreme court of the United States, the court saying:

"The order of the commission merely meant this: If a Vicksburg merchant who received a carload of grain over the

Shreveport road was permitted by the railway company to ship over the Vicksburg road to Meridian any other carload at 3½ cents per 100 pounds, every other merchant in Vicksburg should be permitted to ship at the same rate, although he had had no dealings with the Shreveport company. It is unnecessary to inquire whether the order could be sustained if it appeared that the plaintiff received only 3½ cents as its share of a total rate on through shipments to Meridian from the Northwest by the Shreveport road; for here, under the guise of a rebilling rate, the Vicksburg merchant who dealt with this Western road was given a rate of 3½ per cent on any grain that he might see fit to ship to Meridian. While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi-public service. When voluntarily the Vicksburg company established a local rate of 3½ per cent from Vicksburg to Meridian for those who had within 90 days made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not.

"We are not unaware of our decision in *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, in which, on review of the interstate commerce act, we held that a mere inequality of rate was not always proof of undue discrimination, but we were passing upon an act of Congress and seeking to ascertain its intent and scope. There was no intimation that it was not within the power of Congress to prescribe an absolute equality of rate. In the present case we are not construing an act of the state of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the supreme court of the state, and the question we have to consider is the power of the state to

enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power cannot be doubted, and it cannot be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it cannot resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies."

See, also, *Laurel Cotton Mills v. Gulf etc. R. Co.*, 84 Miss. 339, 37 South. 134, 66 L. R. A. 453; *Gulf etc. R. Co. v. Laurel Cotton Mills*, 91 Miss. 166, 45 South. 982.

We hold, therefore, that the contract is valid and binding upon the parties thereto, that it violates no principle of public policy and is capable of being enforced. It follows that the judgment appealed from must stand affirmed, and it is so ordered.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

CHADWICK, J., concurs in the result.

ON PETITION FOR REHEARING.

[*En Banc.* July 18, 1910.]

RUDKIN, C. J.—A petition for a hearing *en banc* has been filed in this case, in which the appellant earnestly insists that our former opinion is in direct conflict with the decision of the supreme court of the United States in the case of *Armour Packing Co. v. United States*, 209 U. S. 56. It seems to us, however, that this case is readily distinguishable from the case cited, on two grounds: First, because there was here a consideration for the contract, in addition to and independent

of the freight rate agreed upon, so that the rate is not necessarily discriminatory; and second, because the contract was entered into before the passage of the railroad commission act and the amendments thereto, and there is nothing in the latter acts tending to show that the legislature intended to abrogate previously existing valid contracts, conceding that it had the constitutional power to do so.

The petition is therefore denied.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8667. Department One. June 3, 1910.]

AMERICAN MULTIGRAPH SALES COMPANY, *Respondent*, v. JOHN D. JONES, *Appellant*.[1]

SALES—CONDITIONAL SALES—FILING—NECESSITY. Rem. & Bal. Code, § 3670, providing that all conditional sales of personalty placed in the possession of the vendee shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless a memorandum of the sale is filed in the auditor's office within ten days after taking possession, is designed to protect subsequent creditors, and renders a sale absolute if the filing is not made as required, although the memorandum was filed before creditors asserted their claims.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action of replevin. Reversed.

Frank E. Green, for appellant.

Robert F. Booth, for respondent.

CHADWICK, J.—This case requires no statement of facts. It involves only an answer to the question, is a conditional bill of sale void as against a subsequent creditor in good

[1]Reported in 109 Pac. 108.

faith, if not filed within ten days. Section 3670, Rem. & Bal. Code, reads as follows:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The trial judge held, and directed a verdict, upon the theory that a conditional bill of sale was not void as against subsequent creditors if filed before the assertion of their claims, basing his decision upon *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022, wherein it was said:

"The failure to record the bill of sale within ten days would only protect such parties as had obtained intervening rights after its execution and before the time it was filed for record."

That case construed section 1454, 1 Hill's Code, now § 5291, Rem. & Bal. Code, wherein it is provided, that no transfers of personal property shall be valid as to existing creditors where the property is left in possession of the vendor, unless the bill of sale be recorded within ten days after such sale is made. It is evident, and was so held in *Greenwood v. Corbin*, 48 Wash. 357, 93 Pac. 433, that this section has no application where no debts existed at the time of the sale. In other words, the bill of sale statute, Rem. & Bal. Code, § 5291, was designed to protect existing creditors, while the conditional sale statute is designed to protect subsequent creditors. As against this class, the sale is made absolute unless a memorandum has been recorded within ten days after the vendee takes possession. The question before us has been but recently decided. *Chilberg v. Smith*, 174 Fed. 805. That part of the opinion which is material to our present discussion follows:

"Ordinarily, certain instruments, such as deeds and mortgages may be recorded at any time after their execution, and the record will be effective as against all claims attaching subsequently, unless there have been such circumstances and unreasonable delay as to constitute laches, and ordinarily statutes in regard to the registration of such instruments, while requiring that they may be filed within a certain time, are not to be so construed as to render them void as to subsequent lienors with notice if not so recorded. But the statute of Washington, in regard to the registration of conditional sales, declares the policy of the state in regard to agreements, whereby a vendee of personal property so sold is placed in the possession thereof with all the apparent indicia of ownership, and it clearly provides that, unless the instrument be recorded within 10 days from the delivery of the property to the vendee, the sale shall be absolute as to subsequent creditors in good faith. The period of 10 days thus provided is the limit of the time within which the right to continue to hold, as conditional as to all the world the sale of personal property, may be exercised. At the end of that time, it no longer exists, and subsequent creditors are not required to examine the records to ascertain whether the vendor retains the title to the property. The statute was evidently enacted in view of the common-law rule that the title to property passes by delivery of possession, and possession is evidence of ownership, and the intention of the legislature is clearly expressed, that all conditional sales of personalty shall be absolute as to subsequent creditors and lienors unless the provisions of the act are strictly complied with."

The court then proceeds to distinguish the *Sayward* case, saying that it casts no appreciable light upon the question of the construction of the statute which is here involved.

The lower court erred in its judgment, and the cause will be reversed and remanded with directions to resubmit the disputed questions of fact to a jury.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8753. Department One. June 3, 1910.]

DORA L. PIERCE, *Appellant*, v. CHARLES REUBEN PIERCE, *Respondent*.[1]

DIVORCE—MARRIAGE—RIGHT TO REMARRY—DOMICILE—INTENT OF PARTIES. Where a person is divorced in this state, and marries again in another state or country within the prohibited period during which an appeal from the divorce decree could have been taken, in violation of Rem. & Bal. Code, § 991, the validity of the marriage depends upon the domicile of the party at the time of the marriage, the statutes of this state having no extraterritorial force except as to parties domiciled in this state who leave for the purpose of evading the law and returning to their domicile.

DIVORCE—RIGHT TO REMARRY—DOMICILE—EVIDENCE OF INTENT—SUFFICIENCY. Where the validity of a marriage depends upon the domicile of the parties and the legitimacy of a child is involved, all doubts are resolved in favor of its validity; and the evidence is insufficient to show that a divorced woman who married again shortly after in Victoria, B. C., was domiciled in this state and left here with the intent to evade our laws and return, where she testified positively that she objected to such a proceeding on the ground of its illegality, and acted upon a suggestion that she go there to live, being assured that she would like it there, and it appears that the other party to the marriage had his business up for sale, went to Victoria alone, and sent back for her to come and be married, and after the marriage, they returned to this state because he saw no opening for business there, and they then lived in this state as husband and wife, where they had one child.

SAME—ESTOPPEL. In such a case, the man should not be heard to deny the marriage if he induced the woman to leave the state to marry him with an intent to establish a domicile in another country.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 8, 1910, dismissing, at the close of plaintiff's case, an action for separate maintenance, after a hearing before the court. Reversed.

Marion Edwards, *E. L. Sanders*, and *Carroll A. Gordon*, for appellant.

John C. Witt and *Blaine, Tucker & Hyland*, for respondent.

[1]Reported in 109 Pac. 45.

CHADWICK, J.—Dora L. Pierce and Charles Reuben Pierce were married at Victoria on March 15, 1907, and lived together as husband and wife until April, 1909, when Mrs. Pierce was abandoned by defendant. One child has been born to them. This action was begun by plaintiff to compel maintenance on the part of the defendant. The court below held the marriage to be void, and from a judgment of dismissal, this appeal is waged. The trial court found that, inasmuch as the appellant had been divorced from a former husband in the superior court of King county and had remarried within six months after the entry of the decree, and it appearing that they were domiciled in this state, the marriage was void under Rem. & Bal. Code, § 991. Such facts as are material to our discussion will be set out in the body of the opinion.

The question before us was first considered by this court in *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573. It was there held that the original statute (2 Hill's Code, § 771) providing that a remarriage should not take place within the time limited for appeal, had extraterritorial effect, and that a marriage within that time, whether performed within or without the state, was void. In *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923, the same statute being under consideration, it was held that the statute had no extraterritorial effect, the court attempting to disinguish the *Smith* case rather than overruling it as was suggested in the dissenting opinion. In the *Willey* case the court said, in referring to the *Smith* case:

"It may be said that in that case the parties were all residents of this state, and the marriage solemnized in the face of the prohibition of the statute then in force;"

showing that the question of domicile was in the mind of the court at the time the decision was pronounced.

The first and only case construing the statute of 1893, Rem. & Bal. Code, § 991, is that of *State v. Fenn*, 47 Wash.

561, 92 Pac. 417, 17 L. R. A. (N. S.) 800. By that statute it is provided that, "all marriages contracted in violation of the provisions of this section, whether contracted within or without this state, shall be void." In that case the marriage had occurred in Victoria within ten days after the decree of divorce had been rendered in King county. The conclusion of the court was:

"We are satisfied that the prohibition in question was directed solely against marriages within the state, or by persons domiciled within the state, but contracted in other states for the purpose of evading our laws, and that no other persons or marriages are included or contemplated. Within the above rule, the information before us does not contain matters which constitutes an offense for it does not appear that the Victoria marriage was void. If the parties to the Victoria marriage had their domicile in this state at the time the marriage was contracted, and went to Victoria for the purpose of evading our laws and thereafter returning to this state, such marriage was null and void, and, much as we regret it, the prosecution must fail. If, on the other hand, the parties to the Victoria marriage were domiciled there at the time the marriage was contracted, such marriage does not fall within the prohibition of our statute and is valid."

In *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500, a marriage entered into by persons within prohibited degrees of consanguinity was held to be void where it appeared that the parties were domiciled in this state and that to avoid our local law they went to Victoria, were there married, and immediately returned to their domicile.

Reference to the several decisions mentioned will show that the court has striven to reconcile two rules of law, each designed to serve a strict public policy; the one that a marriage, legal under the law of the place where contracted, is legal everywhere, and the other that divorced persons shall not remarry within the time allowed for appeal. In thus struggling to serve, as it would seem, the higher purpose, the courts have left this question not so much one of law, but of mixed law and fact, the positive inhibition of the statute

being held to apply only to citizens of this state. Thus, the question of domicile is made the supreme and controlling one in all cases of this character. So, as was intimated, if not positively held, in the *Fenn* and *Willey* cases, courts will go beyond the record of the marriage and inquire into the intent or domicile of the parties. If the marriage is entered into by one who has in good faith removed to another jurisdiction, not for the mere purpose of the marriage or to evade the rigor of the local law, but to establish a domicile, the marriage should be held to be valid. Whereas, if it appears that the parties, being domiciled in this state, have gone to another jurisdiction with the primary intent to evade our law and marry in defiance of it, the marriage should be held to be void.

This brings us to the facts in this case. Appellant and respondent had become acquainted prior to her divorce. The subject of marriage had been discussed between them, and we think there is no doubt of the anxiety of the respondent to hasten the divorce as well as his own marriage with appellant. After appellant's divorce, she says that he frequently importuned her to go to Victoria, or some other place, to be married; that she refused to consider any such proposition because, in her judgment, it would be illegal under the laws of this state. Their relations appear to have been amicable up to about March 13, when, without taking any leave of appellant, respondent went to Victoria. On the way he fell in with a mutual friend, with whom he had a conversation with reference to appellant, and told him that he was going to Victoria "to get away from the girl." The friend advised him to either return to Seattle or to have her come to Victoria and marry her. Upon arriving at Victoria, he telephoned appellant to come to Victoria and be married. She gave up a position then held by her, and her room, and went to Victoria, respondent meeting her at the wharf. He had previously procured a license, and they were driven to the home of a clergyman and were there married. After

three or four days, respondent told appellant that he could find no opening for business in Victoria, and they would return to Seattle, which they accordingly did. Thereafter respondent purchased a home, and the parties lived together until the desertion. It may be that in all this no intention to change his domicile can be attributed to respondent. But appellant swears positively that he met her objection to the proposition that they marry immediately, by suggesting that they could go to California or British Columbia and live there and the marriage would be legal. She swears, too, that it was her understanding that they were to live in Victoria; that she went there so intending; that he met her exclamations as to the beauty of the place and its surroundings with the assurance that she would like it there. She swears, too, that he had his business up for sale, and expected that it might be sold at any time. They afterwards returned to Seattle for the reason, as appellant says, that respondent saw no opening for business in Victoria and said that he would have to return to Seattle in order to get more money. She is corroborated in some of these things by other witnesses.

We confess that the testimony is not altogether satisfactory. But in a case like this, where the validity of the marriage depends on the domicile, all doubts should be resolved in favor of appellant's testimony, the validity of the marriage, and the legitimacy of the child. If, then, the appellant went to Victoria *animus manendi*, induced by respondent's conduct, he should not be heard to deny the marriage when the consequences would fall so heavily upon the head of innocence. We know of no public policy which will warrant a court in annulling a marriage between competent parties if there be any evidence to sustain it, and especially so where it appears that the parties have consummated the marriage, a child has been born, and the offending party has been openly acknowledged as a spouse. It will not be done unless it clearly appears that the parties willfully went beyond the jurisdiction of the courts of this state to

avoid and defy our laws. It is not clear that they did so in this case.

The judgment of the lower court is reversed, and the case remanded for further proceedings in accordance with this opinion.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8672. Department Two. June 3, 1910.]

E. M. GORDON, *Respondent*, v. G. B. GILLESPIE, *Appellant*.[1]

CONTRACTS—BUILDING CONTRACTS — CONSTRUCTION — INDEMNITY — BREACH OF CONTRACT—ACTIONS—ACCRUAL. A contract whereby defendant was to furnish all labor and material to completely finish the painting, tinting, and staining of a building, for a consideration of so much per hour for his own labor and his workmen, and actual cost of material, etc., to be advanced by the plaintiff, "guaranteeing and agreeing" that the total cost should not exceed $1,500, is one to fully perform for the sum of $1,500 or less, and not merely a contract of indemnity; and the owner's right of action to recover as damages the difference between the contract price and his actual cost in completing the work accrues as soon as the contract is breached.

ATTACHMENT—GROUNDS—DISSOLUTION—EVIDENCE—SUFFICIENCY. It is not an abuse of discretion to refuse to dissolve an attachment sought on the ground that defendant was guilty of a fraud in entering into a contract whereby he was to finish a house, and that defendant was about to dispose of his property, where the evidence tended to show that materials not used were charged against the owner, that he misappropriated funds supplied to pay labor claims, and was attempting to dispose of his property, and it appears that the attached property might have been squandered and dissipated.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 8, 1909 upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Chas. E. McAvoy and *Jno. Trumbull*, for appellant.

Byers & Byers, for respondent.

[1]Reported in 109 Pac. 109.

RUDKIN, C. J.—On the 27th day of August, 1908, the parties to this action entered into the following written contract:

"Agreement, made and entered into this 27th day of August, 1908, by and between E. M. Gordon, party of the first part, and G. B. Gillespie, party of the second part, all of Seattle, King county, Washington, Witnesseth:

"(1) The party of the second part agrees, for the consideration hereinafter mentioned, to furnish all labor and material and to completely finish all of the painting, varnishing, tinting and staining which enters into the construction of the three story and basement brick apartment building situated upon the southeast corner of Harrison Street and Queen Anne Avenue in the City of Seattle, Washington.

"(2) The party of the second part further agrees to furnish all equipments, scaffolds, ladders, falls, canvas, clothes, etc. necessary for the completion of this work without cost to the party of the first part, and to carry out and complete the work before mentioned for the consideration of seventy-five (75) cents per hour for actual time spent by him overseeing and directing said work, further he is to receive the sum of four (4) dollars and fifty (50) cents per day from the party of the first part for the mechanics employed by him to execute said work, and also the actual cost of the material purchased and used for said painting, the party of the second part furnishing vouchers and pay rolls showing the actual cost of this work; the party of the second part guaranteeing to completely finish all said painting, varnishing, tinting and staining in a thoroughly first-class workmanlike manner under the direction and to the satisfaction of W. P. White, Architect, and according to the requirements of the plans and specification prepared by said architect for said building, receiving therefor the actual cost of material, four dollars and fifty cents per day for the men employed, and seventy-five cents per hour for the actual time spent by him in overseeing said work as before mentioned; the second party guaranteeing and agreeing that the cost of said painting shall not exceed the sum of One Thousand Five Hundred ($1,500) Dollars.

"(3) The party of the first part agrees, in consideration of the conditions and obligations herein mentioned being per-

formed and carried out, to pay the consideration hereinbefore mentioned in installments as follows:

"As work progresses sufficient money shall be advanced on each alternate Saturday to pay the wages of the men employed, bills for material purchased after being OK'd as correct by the party of the second part shall be delivered to first party who shall settle same directly with the firms furnishing said material; the seventy-five (75) cents per hour mentioned to be paid second party being retained until the completion of the work covered by the contract when it also shall be paid to second party, provided the total amounts so paid does not exceed the guaranteed cost limit of One Thousand Five Hundred Dollars.

"(4) It is further agreed that in the event of additional work being performed by second party as result of mutual agreement that the cost limit herein mentioned shall be increased or decreased a reasonable amount by reason of such changes, the party of the first part paying for additional work, if ordered by him, at the rates herein mentioned."

Soon after the execution of the contract the defendant Gillespie employed laborers, purchased materials, and entered upon the performance of the contract, but later and during the latter part of the month of December, 1908, he utterly failed and neglected to oversee or direct the work and practically abandoned the contract, so that the plaintiff, Gordon, was compelled to, and did, take charge of the work himself. Extra work was performed under the contract to the value of $133.50, and the plaintiff paid out and incurred obligations to the amount of $1,939.79 in completing the contract according to its terms, and for extras, or the sum of $306.79 in excess of the cost of the extras, and the $1,500 for which the defendant agreed or guaranteed to complete the contract. This action was instituted to recover from the defendant the excess over and above the contract price and the cost of the extras, and from a judgment in favor of the plaintiff, this appeal is prosecuted.

It appears, without apparent contradiction, that the respondent paid out and incurred obligations to the amount of the judgment in the completion of the contract, over and

above the contract price, and it likewise appears that a considerable portion of this sum was paid after the institution of this suit. The principal contention of appellant arises out of what we consider a misconstruction of the contract. He assumes that his promise or guaranty that the total cost of the work specified in the contract should not exceed the sum of $1,500, was a mere contract of indemnity, and that no right of action would accrue in favor of the respondent for its breach until sums in excess of the $1,500 had actually been paid. But as we view the contract, the appellant agreed to fully perform the contract for the sum of $1,500, or less in the event the cost of materials, labor and supervision did not equal that sum, and the respondent would have the same remedy for a breach of such a contract as for the breach of any other building contract. The right of action accrued to the respondent as soon as the contract was breached, and his measure of damages was the difference between the contract price and the actual cost of completing the work. Such was the construction placed upon the contract by the court below, and in that construction we fully concur. This also disposes of the claim that the indemnity contract was without consideration.

A writ of attachment was sued out at the commencement of the action, and a motion thereafter interposed to dissolve the attachment was denied. This ruling is assigned as error. Fraud in contracting the debt, and that the appellant was about to dispose of his property for the purpose of placing it beyond the reach of his creditors, was the basis of the attachment. The affidavits read on the hearing of the motion to dissolve tended to show that materials not used in the performance of the contract were charged up against the building, at the instance of the appellant, that he misappropriated funds paid to him by the respondent for the purpose of paying labor claims, and that he was attempting to dispose of his property. It may be that the excessive charge for materials and the misappropriation of funds did not constitute

fraud "in contracting the debt," within the meaning of the attachment statute; but, however that may be, these were circumstances the court had a right to take into consideration in determining the other question, and we are not prepared to say that the court erred in its conclusion that the attached property would have been dissipated and squandered in fraud of the rights of creditors had no attachment issued.

The judgment and order are therefore affirmed.

MOUNT, PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8694. Department Two. June 3, 1910.]

THE STATE OF WASHINGTON, *Appellant*, v. J. B. MAMLOCK, *Respondent*.[1]

INDIANS—SALE OF INTOXICATING LIQUORS—POLICE POWER. Rem. & Bal. Code, § 6288, prohibiting the sale of intoxicating liquors to Indians, is a valid exercise of the police power, inherent in state sovereignty; and accordingly does not violate the fourteenth amendment to the Federal constitution in so far as it prohibits sale to Indians who are citizens; nor art. 1, § 8 of the constitution conferring authority on the general government to regulate commerce with Indian tribes, in so far as it prohibits sales to Indian wards of the United States.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 5, 1910, upon sustaining a demurrer to the information, dismissing a prosecution for selling intoxicating liquor to an Indian. Reversed.

J. L. McMurray and *A. B. Bell*, for appellant.

John Leo, for respondent.

RUDKIN, C. J.—An information was filed in the court below charging the defendant Mamlock with the crime of selling intoxicating liquor to an Indian, in violation of § 6288, Rem. & Bal. Code. A demurrer to the information was sustained,

[1]Reported in 109 Pac. 47.

and from an order of dismissal, the state has prosecuted this appeal. In support of the demurrer in the court below, and in support of the judgment here, the respondent contends that the legislative act, under which the information was filed, violates the fourteenth article of the amendments to the constitution of the United States, in so far as it prohibits the sale of intoxicating liquors to Indians who are citizens of the United States, and section eight of article one of the constitution of the United States, conferring authority on the general government to regulate commerce with the Indian tribes, in so far as it prohibits sales to Indians who are wards of the United States under charge of an Indian agent or superintendent.

The validity of state laws prohibiting the sale of intoxicating liquors to certain classes of persons who are peculiarly liable to be injured morally or physically by their use, such as minors, persons already intoxicated, habitual drunkards, idiots, and insane persons, has so often been affirmed by the courts that the question is no longer an open one. Black, Intoxicating Liquors, § 42; 23 Cyc. 163. That the American Indian falls within the classes thus defined, whether he be a citizen of the United States or otherwise, is equally well settled. Black, Intoxicating Liquors, § 427; *Territory v. Coleman*, 1 Ore. 191, 75 Am. Dec. 554; *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134; *State v. Wise*, 70 Minn. 99, 72 N. W. 843; *People v. Bray*, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; *People v. Gebhard*, 151 Mich. 192, 115 N. W. 54; *Tate v. State*, 58 Neb. 296, 78 N. W. 494.

As said by the supreme court of Minnesota in *State v. Wise, supra*:

"The statute is a police regulation. It was enacted in view of the well-known social condition, habits, and tendencies of Indians as a race. While there are doubtless notable individual exceptions to the rule, yet it is a well-known fact that Indians as a race are not as highly civilized as the whites; that they are less subject to moral restraint, more liable to acquire an inordinate appetite for intoxicating liquors, and

also more liable to be dangerous to themselves and others when intoxicated. In view of these considerations, it was thought wise to protect persons of that race as well as the community at large by prohibiting the sale of intoxicating liquors to them altogether. We are therefore of opinion that the statute applies to and includes all Indians as a race, without reference to their political status. Thus construed, the statute is a valid exercise of the police power of the state. It is neither arbitrary class legislation, nor does it abridge the privileges or immunities of citizens of the United States, or deprive any person of liberty or property without due process of law, within the meaning of the fourteenth amendment of the Federal constitution. The difference in conditions between Indians as a race and the white race constituted a sufficient basis of classification."

Similar language was used by the supreme court of California in *People v. Bray, supra.* The conclusion that the regulation in question is a mere police regulation is perhaps a sufficient answer to the claim that the statute violates the commerce clause of the Federal constitution.

"The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Constitutional Limitations (6th ed.), 704.

"Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires." 8 Cyc. 863.

The police power inheres in state sovereignty and was not delegated to the Federal government by the original

constitution, or by any of the later amendments. As said by Mr. Justice Field in *Barbier v. Connolly*, 113 U. S. 27, speaking of the fourteenth amendment,

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

See, also, *Slaughter-House Cases*, 16 Wall. 36; *Mugler v. Kansas*, 123 U. S. 623; *Territory v. Guyott, supra;* Cooley, Constitutional Limitations, p. 11; 8 Cyc. 865.

We are therefore of opinion that the law in question is a valid exercise of the police power of the state, and inasmuch as the information charges a crime under its provisions, the judgment of the court below is reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

MOUNT, DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8790. Department Two. June 4, 1910.]

R. V. ANKENY, *Respondent*, v. YOUNG BROS., *Appellant*.[1]

APPEAL—REVIEW—VERDICT. Upon a direct conflict in the evidence of two witnesses, the question becomes one of fact for the jury, and its verdict cannot be set aside on appeal.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error in instructions cannot be urged where no exceptions appear in the record.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 10, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for goods sold and delivered. Affirmed.

[1]Reported in 109 Pac. 109.

McClure & McClure, for appellant.

Todd, Wilson & Thorgrimson, for respondent.

MOUNT, J.—This is the second appeal in this case. The facts are stated fully in the opinion on the former appeal, *Ankeny v. Young Bros.*, 52 Wash. 235, 100 Pac. 736, and need not be restated here. After that decision, the case was retried to the court and a jury, and a verdict was rendered in favor of the plaintiff for the amount claimed in the complaint. From a judgment upon the verdict, the defendant has again appealed.

It is argued that the evidence is not sufficient to sustain the verdict for the amount claimed in the first cause of action, for the reason that the evidence fails to show that the coffee ordered was the coffee actually shipped. This argument is based largely upon certain exhibits and the explanations thereof made by Mr. Young, a witness in his own behalf. This evidence was contradicted by Mr. Falkinham, a witness for the respondent, who made the exhibits and also had charge of the coffee, and who testified directly that the identical coffee which was ordered was delivered on board the steamship. The question whether the coffee ordered was the coffee shipped was, therefore, a question for the jury, and it was determined in favor of the respondent.

Appellant also argues that the court erred in giving and refusing several instructions. The record fails to show that any exceptions were taken to the instructions given and refused. Error in that respect, therefore, cannot be urged upon this appeal. *Hawkins v. Casey*, 38 Wash. 625, 80 Pac. 792; *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791. We may say, however, that we have examined the instructions given and refused, and are satisfied that there is no error therein, and that the same cover the law of the case as laid down upon the former appeal.

The judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8761. Department Two. June 4, 1910.]

HERVEY LINDLEY, *Appellant*, v. J. R. McGLAUFLIN *et al.*, *Respondents*.[1]

MECHANICS' LIENS—FILING SECOND CLAIM—ACTION—LIMITATIONS—TIME TO SUE. Where a second notice of mechanics' lien is filed within the ninety days allowed by Rem. & Bal. Code, § 1134, for filing claims, for the purpose of correcting a supposed error in the first notice, the eight months allowed by Id., § 1138, for the commencement of an action to foreclose the lien begins to run from the date of filing the last notice; Id., § 1147, requiring a liberal construction of the lien laws, and there being no provision of law preventing the filing of successive liens within the ninety-day period.

Appeal from a judgment of the superior court for King county, Main, J., entered January 3, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

J. T. Watson and *Dorr & Hadley*, for appellant.

Roberts, Battle, Hulbert & Tennant (*C. J. France*, of counsel), for respondents.

MOUNT, J.—This is an appeal from a judgment denying the foreclosure of a materialman's lien. A personal judgment was entered against the defendants J. R. McGlauflin and wife, but the trial court was of the opinion that the right to foreclose the lien was barred, and for that reason denied the foreclosure. The plaintiff appeals from that part of the decree.

It appears that on January 13, 1908, the appellant filed a claim of lien for $1,104.32, for labor and materials furnished in the construction of a house upon certain described real estate, alleging therein that the furnishing of such materials ceased December 10, 1907. Thereafter, on March 7,

[1]Reported in 109 Pac. 118.

1908, and within ninety days from the time of furnishing the last item, the appellant filed another lien claim for $1,148.12, in which it was recited "that this claim of lien is made for the purpose of correcting and amending that certain claim of lien heretofore filed, to wit, on January 13, 1908, and recorded in volume 27, Liens, page 522 of King County, Washington." On September 4, 1908, appellant commenced an action, in which it alleged the filing of the lien on January 13, 1908, and that it afterwards discovered that said lien claim did not contain a complete statement of the materials furnished, and that on March 7, 1908, a correct and amended lien was filed. That action sought to foreclose the first lien as amended by the lien filed March 7, 1908. Thereafter, on October 16, 1908, the appellant voluntarily dismissed, without prejudice, the action commenced September 4, 1908. Thereafter, on October 30, 1908, appellant brought this action to foreclose the lien claim filed on March 7, 1908. In this action the lien claim filed on January 13, 1908, was not mentioned, except as it is referred to by the clause of the lien notice above quoted. It will be noticed that the last item of materials was furnished on December 10, 1907. The first lien claim was filed within thirty days thereafter, and the one now sought to be foreclosed was filed within ninety days. This action was begun within eight months after the filing of the last claim, but not within eight months after the filing of the first claim of lien. The statute provides:

"No lien created by this chapter shall exist, and no action to enforce the same maintained, unless within ninety days from the date of the cessation of the performance of such labor or the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided . . . and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment." Rem. & Bal. Code, § 1134.

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be com-

menced in the proper court within that time to enforce such lien, . . ." Rem. & Bal. Code, § 1138.

The main question in this case is whether the eight months began to run from the date of the filing of the first lien claim, or the date of the filing of the last lien claim. The lower court was of the opinion that the time began to run from the date of the filing of the first claim, for the reason that there can be filed but one perfect lien claim, and that the first one appeared upon its face to be a perfect claim. The statute does not limit the number of lien claims which may be filed, but it limits the time for filing such claims to within ninety days from the date of the cessation of labor or the furnishing of material. Clearly, the appellant was entitled to file a lien notice at any time within the ninety days. It filed one before the expiration of thirty days, and then discovered that it had not included therein the whole amount due. It then, within the ninety days, filed another claim, and stated that this claim is made for the purpose of correcting and amending the prior claim. The statute provides for amendments after action brought and also that "the provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects." Rem. & Bal. Code, § 1147. It would seem that such liberal construction would permit a claimant to file as many claims as he thought necessary within the ninety-day period, and that, if the first one did not contain his whole claim or was, in his opinion, defective in any respect, he might, within that time, file another. Many cases are cited by the appellant as sustaining this rule, while none are cited by the respondent as opposed to it. In *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, this court said:

"It appears that two lien notices were filed, one on March 7, 1891, which was ruled out by the court at the trial on the ground that it was prematurely filed; but a subsequent notice filed May 13, 1891, after the delivery of all the materials,

was admitted. The last portion of the materials had been shipped and were on their way here when the first notice was filed, but had not yet arrived. If in consequence of this the first notice was prematurely filed, it would not deprive the respondent of the right to file another notice after all the materials had been delivered."

In *Clarke v. Heylman*, 80 App. Div. 572, 80 N. Y. Supp. 794, the court said:

"There is no provision of the lien law which prevents a person furnishing materials or labor in the erection of a building upon real property from filing more than one lien upon such property. It is doubtful whether these notices of lien annexed to the defendant's answer were sufficient under the statute to create any lien upon the property therein described; but, assuming that they would be sufficient, and that they were filed during the performance of the contract, and subsequently, when the contract was fully performed, a new lien was filed for the amount due under the contract, I know of no provision of the lien law which would prevent the person filing the last lien from enforcing it, and abandoning the liens filed during the performance of the contract. There is nothing in the statute which provides that successive liens may not be filed for the same work, or that a notice of lien filed upon the completion of the contract is void, because other notices of liens have been filed for a portion of the work done under the contract."

In *Barnett v. Clooney*, 68 Mo. App. 146, the court said:

"The defendant claims that as the suit was instituted on the second mechanic's lien filed, he was entitled to have the plaintiff nonsuited, provided the first lien filed was a *good* and *valid* lien, because in that event the second lien was a nullity and would not support a motion. While this seems to have been the rule in this state once, the later decisions, as pointed out in the opinion, have established a more equitable rule. Under these decisions the second lien is not a nullity, if the first lien filed was in any way *defective*. . . . It is the proper practice in such cases to have the second lien account refer in some manner to the first, so that the record should not show two encumbrances, where in fact only one exists."

In *El Reno Elec. Light & Telephone Co. v. Jennison*, 5 Okl. 759, 50 Pac. 144, the court said:

"So long as a party's time for filing a mechanic's lien had not expired, he could file as many statements in his effort to make a good lien as he chose, and certainly he could not be held to have exhausted his right by filing one or two or more imperfect statements. He might file half a dozen defective ones during that period, and then file one good and perfect one, and recover on that, disregarding all of the others."

In *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W. 811, the court said:

"In this case the plaintiff had the right to include in one lien all of the houses and lots, . . . While the first lien was not void, as in the two cases last stated, still it was defective, in this: that it omitted one house and the half of one lot. Being a defective and incomplete lien statement, the plaintiff could file a perfect one at any time within the period prescribed for filing lien statements."

In *Bournonville v. Goodall*, 10 Pa. St. 133, the court said:

"Nor is there anything in the suggestion that the means of enforcing the lien given to mechanics and materialmen by the act of 1836, is exhausted in an abortive attempt to pursue the directions of the statute, by filing the claim within six months. This is but the mode of giving it fruitful effect, and should it fail from some technical or even substantial defect, the lien is no more destroyed than would be a bond sued out by an improper or inapplicable writ. The claim still remains, and so does the lien, until barred by the lapse of six months after the work finished or materials furnished."

In *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748, the court said:

"Under the law, plaintiffs had 90 days from the date of the last delivery of the lumber, the 10th day of September, 1884, in which to file their lien. Code Civil Proc., § 662. This being true, plaintiffs had the right, if dissatisfied with the lien as first filed, to amend it, or prepare and file a new one, at any time within the said 90 days."

In 27 Cyc., at page 206, the rule is stated as follows:

"It has been laid down flatly that the notice or claim of lien must be complete in itself at the time when it is filed for record in order to authorize its enforcement, and it is not capable of being amended or reformed, but the better rule appears to be that while the claim cannot be amended after the expiration of the time allowed for filing without statutory authority, prior to the expiration of that time it may be amended, or a new claim may be filed. In a number of jurisdictions, however, the statutes provide for the amendment of the claim or statement, even after the time allowed for filing has expired, and such amendment may be in matters of substance as well as in matters of form."

See, also, 20 Am. & Eng. Ency. Law (2d ed.), page 439.

We think this last statement is the correct rule under the liberal provisions of our statute. It follows that, if the appellant might file a new or amended claim of lien within the ninety-day period, the time for bringing the action to foreclose the same did not begin to run until the date of the filing of the claim upon which he relied.

Respondents argue that, because appellant began an action within eight months from the filing of the first claim in which both claims were mentioned, this shows that appellant relied upon the first claim. That action was voluntarily dismissed without prejudice, and is, therefore, of no force in determining whether the appellant relied upon the one or the other. In our opinion, the appellant was at liberty to rely upon the claim last filed if he chose to do so, and the time began to run from the time it was filed. The action was not barred until eight months after the date that claim was filed. The trial court therefore erred in holding that the lien claim was barred.

The judgment appealed from is therefore reversed, and the cause remanded with directions to the lower court to enter a decree foreclosing the lien for the amount due thereon, including a reasonable attorney's fee therein.

Rudkin, C. J., Parker, Dunbar, and Crow, JJ., concur.

[No. 8743. Department Two. June 4, 1910.]

W. L. THOMPSON, *Appellant*, v. JOSEPH SCHONER *et al.*, *Respondents*.[1]

TAXATION—PROCESS—SUMMONS—SUFFICIENCY. A tax foreclosure judgment is void where it was entered upon the service of a summons by publication which required the defendants to appear within sixty days after the service of the summons, instead of sixty days after the first publication.

DEEDS—EXECUTION—EVIDENCE TO CONTRADICT—SUFFICIENCY. Evidence contradicting a certified copy of the record of a deed, and showing that the grantors did not in fact execute and acknowledge the same, must be "clear, cogent and convincing;" and is insufficient where it merely appears that one of the grantors, on an improper cross-examination, could not say whether she executed the deed, and she did not deny that she had acknowledged it, having left everything to her attorney, and the attorney testified that the deed had been executed and delivered for the purpose of conveying the title.

Appeal from a judgment of the superior court for King county, Main, J., entered November 4, 1909, upon granting a nonsuit, dismissing an action to vacate a tax foreclosure judgment, and to quiet title, after a hearing before the court. Reversed.

G. A. Hill and *Fouts & Gould*, for appellant.

Todd, Wilson & Thorgrimson, for respondents.

DUNBAR, J.—One Ella H. Ruegg, a spinster, acquired title to the property in controversy by deed dated March 25, 1894. She subsequently married O. E. Kittredge. She paid no taxes on the property, and in 1900 one James McGrew brought action to foreclose a delinquent tax certificate on said property for the taxes for the years 1894, 1895, and 1896, having paid the taxes for the years 1897, 1898, 1899, and 1900. Service in said foreclosure action was made by

[1]Reported in 109 Pac. 116.

publication, and judgment and decree were entered and filed therein on January 21, 1901. The property was sold under said decree, and on February 2, 1901, a tax deed was executed to James McGrew. Subsequently, in the years 1902 and 1903, said McGrew and wife sold said land to Joseph Schoner and wife, the defendants in the present action. On February 1, 1908, this action was brought by the appellant, W. L. Thompson, to set aside the judgment rendered in said tax foreclosure proceedings, and to have the said tax deed to James McGrew and the deed from said McGrew and wife declared null and void. The plaintiff in the action, the appellant here, deraigned his title from a patent from the United States, culminating in a quitclaim deed from O. E. Kittredge and Ella H. Kittredge, his wife, the latter being the same person as Ella H. Ruegg.

In the suit by McGrew the summons was by publication, the defendants therein being required to appear and defend the suit, in the language of the summons, "within sixty days after the service of this notice and summons upon you, exclusive of the day of service." It is conceded that this is the only service there was. This summons by publication did not confer jurisdiction, under the rule announced by this court in *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, and *Young v. Droz*, 38 Wash. 648, 80 Pac. 810. While issues were made on this question in the pleadings, it is not contended here that the summons in that case was sufficient to confer jurisdiction.

The respondents rely upon the claim that the appellant did not prove the title in himself, for the reason, as they allege, that there was no proof of the execution of a deed from O. E. Kittredge and Ella H. Kittredge to the appellant, W. L. Thompson. At the close of plaintiff's evidence, the defendants moved for a nonsuit. The court reserved his ruling upon the motion and ordered the trial to proceed. At the

close of the evidence introduced upon behalf of the plaintiff and defendants, defendants renewed their motion for a nonsuit, which motion was granted by the court. Plaintiff excepted to the order of nonsuit and the dismissal of said action. Judgment of dismissal was entered, and appeal followed.

We are forced to the conclusion, from a reading of the testimony, that the court erred in dismissing the appellant's case. This court, in *Western Loan & Sav. Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703, where an attempt was made to challenge the execution of a mortgage, said:

"In the absence of fraud or duress, public policy and the security of land titles require that as important a thing as a certificate of acknowledgment shall not be impeached without that degree of proof which is so clear and convincing that it has not the appearance of being prompted by interested or selfish motives. The rules applicable to the acknowledgment of a deed are equally forcible when applied to a mortgage. In either case, public morals and public security are best served by the requirement of that degree of proof which is disinterested and unaffected by any private advantage sought, before a certificate of acknowledgment shall be held to be impeached."

And quoted the following from *Pierce v. Feagans*, 39 Fed. 587:

"In a case of this character it is not enough that there is a preponderance of evidence in favor of the defendants if it should be conceded that there is such a preponderance in the present case. In the language of the state courts, which furnishes the rule of decision, the burden is on the defendants, and the proof furnished to overcome the certificate must be 'clear, cogent, and convincing.' It is a record that is assailed,—a record of an official act performed more than six years ago, and made contemporaneously with the acts attested. The record is in due form of law, and it is aided by the presumption that always attends the acts of public officers, that the duty devolved on the officer was properly performed in the manner stated."

It is a record the validity of which is questioned in this case. It is a certified copy of a deed of record which was pro-

duced as evidence of the transfer of this land, and it makes no difference in what form of action this question arises, whether the action is brought directly to set aside the deed, or whether it arises collaterally in some other case; the public policy and the result of the determination in either case will be the same.

But we do not think that the testimony was equally balanced in this case, or that there is any question of a preponderance of testimony on the part of the respondent, or any testimony at all which could under any circumstances have the effect of disproving the validity of a deed. The respondent relies largely upon the deposition of Ella H. Kittredge, nee Ruegg, which is the only testimony that it is claimed tends to show the invalidity of the deed or to show that no such deed was ever executed. Mrs. Kittredge had been examined in chief only as to matters pertaining to service of summons upon her. On cross-examination she was asked when she acquired title to this property, and stated that it was through her attorneys and she did not know when; could not state whether it was in 1890, 1895 or 1900; that she left all her business transactions to her attorney; did not know whether she had paid the taxes on the property for any number of years suggested, or at all, or whether any one else had paid the taxes for her, or whether she had ever furnished any money for her attorney or any one else to pay the taxes. She was asked: "When did you and your husband make a quitclaim deed of this property to W. L. Thompson?" and her reply was, over the objection of the appellant that this was not proper cross-examination: "I cannot say that we have made a deed." When asked if she was ever paid any money for a quitclaim deed, she responded that all money was paid through her attorney. She stated that Mr. Hill, her attorney, had given her money, but whether for that particular purpose she could not say. When asked whether she knew, at the time that she executed a quitclaim to the property to W. L. Thompson, that parties were living on the

property and had made valuable improvements, her answer was: "If I ever did, I did not know that there were any parties on it." She was asked: "If this present suit should result favorably to the plaintiff, you expect to receive something for your share or interest in the property, do you not?" to which objection was interposed as before, and her answer was, as it appeared in the deposition introduced in evidence: "If it is my property, I would suppose I would." It is the contention of the respondents that the answer was: "It is my property. I would suppose I would." But it appears that, when the witness read over her testimony, she expressed a desire to correct it by saying her answer was: "If it is my property, I would suppose I would." To this, strenuous objections were made by counsel for appellant, to the effect that he had received a copy of the deposition furnished by the stenographer, and that the answer was: "It is my property." As bearing upon the fact that the witness probably did correct her deposition, the attorney for the appellant, when the following question was asked: "As I understand your answer, it being your property you do expect to receive some benefits as the result of this litigation, provided the tax sale and tax deed are set aside," said: "I object to this question for the reason that it is a wrong interpretation of the witness' answer." Her final answer was: "If there is anything when the lawyers get through, I might get some." The court would not accept the amendment to the deposition, and held that the deposition could not be amended in that way.

But we think it is immaterial whether the deposition was amended or not. At the best, it was merely the expression of an opinion as to where the title of the property was. The testimony, taken as a whole, shows that the witness was not making any claim to the property, and did not deny in any respect that she had acknowledged the deed, simply claiming that she did not know; that the business had been done through her attorney; that everything was intrusted to him, and she had no knowledge on the subject herself, and no

opinion to express. Surely such a statement as this, interjected into a case through cross-examination which was unquestionably illegal, would not warrant the setting aside of a solemn instrument like a deed. But, in addition to this, the attorney whom she mentioned, Mr. G. A. Hill, testified that he was the attorney for Mrs. Kittredge; that the deed introduced in evidence was a certified copy of the original deed; that the transaction was done through him as an agent for Mr. Thompson; that he was Thompson's sole agent; that he made the whole deal and transacted the business, and when asked: "What was the character of the conveyance?" answered: "It was a conveyance of the title. It was not a mortgage. It was not a trust. It conveyed the property to Mr. Thompson whom I represented as his agent."

We think the evidence is entirely insufficient to justify the conclusion reached by the court, and that the judgment should be reversed, with instructions to the court to overrule the motion interposed by the respondents and to determine the value of the property and of the improvements the value of which the respondents are entitled to under the betterment act; and to enter judgment in accordance with such determination.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

[No. 8744. Department Two. June 4, 1910.]

THE STATE OF WASHINGTON, *on the Relation of R. V. Williams, Respondent*, v. M. L. BROOKS, *Appellant*.[1]

MUNICIPAL CORPORATIONS — POPULATION — DETERMINATION — EVIDENCE—JUSTICES OF THE PEACE. It not being the duty of the Bureau of Statistics to enumerate the inhabitants of the state or its cities, its biennial report containing estimates of the population of the cities, with other general information, is not an official determination of the population of a city for the purpose of determining the number of justices of the peace to be elected therein.

JUSTICES OF THE PEACE—NUMBER ELECTED—TENURE OF OFFICE—POPULATION OF CITY—DETERMINATION. Under Rem. & Bal. Code, § 6531, providing for two justices of the peace in cities and towns, as qualified by § 6532, which provides that at the general election in 1898, and biennially thereafter, in cities of more than 5,000 inhabitants there shall be elected only one justice of the peace, two justices of the peace are to be elected in a city formerly having less than 5,000 inhabitants until it is officially determined that the city has more than that number; and such justices hold office until the next biennial election, although thereafter it was officially determined that at the time of their election the city had over 5,000 inhabitants.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered January 17, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court, in proceedings in the nature of quo warranto. Reversed.

Burkey, O'Brien & Burkey, for appellant.

Porter & Powers, for respondent.

PARKER, J.—By this action the relator seeks to be adjudged the sole justice of the peace for the city of Puyallup, to have the defendant ousted from the office of justice of the peace for Puyallup, and to recover from him the amount of

[1]Reported in 109 Pac. 211.

the salary he has received as justice from Pierce county. Upon a trial before the court, judgment was rendered in favor of the relator, from which the defendant has appealed to this court.

It will be conducive to an understanding of the materiality of the facts involved to first have before us certain constitutional and statutory provisions relating to the office of justice of the peace in cities of this state. By section 10 of article 4, of our constitution, it is provided:

"The legislature shall determine the number of justices of the peace to be elected in incorporated cities. . . In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use."

Section 6531, Rem. & Bal. Code, provides generally for the number of justices of the peace in cities as follows:

"Each incorporated city in this state, together with any adjoining precincts, if any there are, lying partly within and partly without said city, shall, for the purposes of this chapter, and for fixing and limiting the number of justices of the peace to be elected in such city, be deemed and considered one precinct, and the qualified electors within the limits thereof shall, at each general election at the several polling places therein, vote for and elect two justices of the peace, and no more."

This provision is qualified by section 6532, Rem. & Bal. Code, which was enacted later, as follows:

"There shall be elected at the general election to be held in November, 1898, and biennially thereafter in cities of more than five thousand inhabitants only one justice of the peace and one constable and no more."

Section 6535, Rem. & Bal. Code, fixes the salary of justices of the peace in cities of more than 5,000 inhabitants at $100 per month. These provisions are further qualified by sections relating to cities of over 35,000 population. There does not appear to be any method provided by statute for offi-

cially determining the fact that a city has more than 5,000 inhabitants.

The facts upon which the rights of the parties to this action depend are undisputed, and so far as necessary for us to notice them, may be summarized as follows: Puyallup is, and has been for many years past, an incorporated city of the third class. At the general election of November, 1908, and at previous general elections the public officials of Pierce county have proceeded upon the assumption that the city did not have more than 5,000 inhabitants, and elections were held accordingly for two justices of the peace. At the election of November, 1908, the official ballots, prepared and furnished by the county auditor for use in the city, contained directions to the voters to vote for two persons for justice of the peace, as required by subdivision 7, section 4893, Rem. & Bal. Code, when more than one person is to be elected to any office. At that election D. A. Whitman received the highest number of votes in the city for justice of the peace, and M. L. Brooks, the appellant, received the next highest number. Upon the official count of the ballots, they were both declared duly elected, and in due course a certificate of election was issued to each of them. In January, 1909, M. L. Brooks, appellant, qualified by taking his oath of office and giving bond, the latter being approved by the board of county commissioners. On January 30, 1909, D. A. Whitman, not having qualified, notified the board of county commissioners in writing that he would not qualify, and thereupon the board entered an order appointing R. V. Williams, respondent, justice of the peace for Puyallup, in place of D. A. Whitman who had been elected and declined to qualify. On February 4, 1909, R. V. Williams, respondent, qualified by taking his oath of office and giving bond, the latter being approved by the board of county commissioners. Thereafter, and until the commencement of this action, both appellant and respondent continued to act as justice of the peace for the city of Puyallup.

On April 30, 1909, in an action in the superior court for

Pierce county, wherein appellant M. L. Brooks was plaintiff and Pierce county was defendant, respondent R. V. Williams not being a party, it was determined that Puyallup was a city having more than 5,000 inhabitants at the time of the election of November, 1908, and at all times since then, and that M. L. Brooks was justice of the peace for the city and entitled to salary of $100 per month. Since then appellant has received such salary from Pierce county. Respondent has received no salary, but has collected fees for his official services and has accounted for and paid them into the county treasury. He has also demanded a salary of $100 per month of the county commissioners, which they declined to pay him. On June 18, 1909, respondent, claiming that the city was entitled to but one justice of the peace, and that he alone was the *de jure* officer entitled to that office, commenced this action, which resulted in the judgment from which this appeal is taken.

It is admitted that the city of Puyallup did in fact have more than 5,000 inhabitants at the time of the election of November, 1908, and it is also admitted that that fact was not judicially determined in any action, nor determined by the board of county commissioners for Pierce county until April, 1909, after the qualification of appellant under his election, and after the qualification of respondent under his appointment. We must presume, also, that the fact that Puyallup had more than 5,000 inhabitants was not determined by the county auditor; for in performing his official duty in preparing the ballots for the November, 1908, election, he proceeded upon the assumption that there were to be elected in the city two justices of the peace, and so instructed the voters. This was a part of his official duty under sections 4891, 4893, Rem. & Bal. Code. We mention this since it might be held that the county auditor could officially determine that the city had more than 5,000 inhabitants, if not otherwise officially determined, incident to his duty in calling elections and in instructing the voters how many justices were to be elected.

However this may be, the record before us negatives the idea that the auditor has ever officially determined that Puyallup has more than 5,000 inhabitants. Of course we take judicial notice of the fact that the United States census of 1900 does not show such fact, and that there has been no Federal census completed since that time.

Our attention is called by learned counsel for respondent to the published biennial report of the "Bureau of Statistics, Agriculture and Immigration" of 1907, offered in evidence evidently for the purpose of showing that the population of Puyallup had been officially determined to be more than 5,000 prior to the 1908 election, and as a basis for the contention that Whitman, in whose place respondent was appointed, was the only duly elected justice for Puyallup at that election, he having received the highest number of votes. That report was evidently prepared under authority shown by sections 8957-8963, Rem. & Bal. Code, prescribing the duties of that bureau. We find nothing in the law, however, making it the duty of the bureau to enumerate the inhabitants of the state or of its cities. While it may be desirable for the bureau, in its report, to give estimates of the population of the state, its counties, cities, etc., together with other general information, such estimates do not amount to an official determination of population. Counsel for respondent cite the case of *Times Printing Co. v. Star Publishing Co.*, 51 Wash. 667, 99 Pac. 1040, wherein this court referred to that report, and others of the bureau, as a source of general information for taking judicial knowledge of the fact that Seattle was a large city. The population of the city of Seattle was not there involved, except in a very general way. The determination of the question involved was influenced only by the fact that Seattle was, generally speaking, a large city and not a small one, and there was no question depending on the number of inhabitants of the city with any degree of certainty. We do not think that case holds that this report constitutes an official determination of the population

of the cities of the state, though it purports to state what the bureau estimates such population to be. We conclude that, prior to April, 1909, there had been no official determination of any nature of the fact that Puyallup has over 5,000 inhabitants.

It is contended by learned counsel for respondent that since the city had in fact 5,000 inhabitants at the time of the 1908 election, there was but one office of the justice of the peace to be filled at that time, and that D. A. Whitman alone was elected to that office, he having received the highest number of votes, and that upon the appointment of R. V. Williams, the respondent, in place of Whitman, respondent became the only justice of peace for the city. We cannot give our assent to this view. It cannot be possible that the going out of existence of one of these offices is dependent upon the existence of a fact, to wit, the population of the city, prior to some official determination of such fact. To hold that immediately upon the city acquiring more than 5,000 inhabitants one of the offices of the justice of the peace ceased to exist, regardless of any official determination of such fact, would be to make the existence of such office depend upon unknown facts officially determinable in the future. A city of less than 5,000 inhabitants might acquire and exceed that population by a few hundred, or even by a considerable larger number for a period of years, and the fact not be known, and no one be sufficiently interested to have the fact officially determined. Under such conditions two justices would continue to be elected, qualify and perform their usual official duties. Some one might then conceive the notion that it would be to his interest, and that he could prove, that the city had acquired 5,000 inhabitants even years before, and proceed to establish that fact by some proceeding in some official manner. Can it be possible that the very existence of a judicial office, and the validity of all the official acts of one holding such an office, was intended by our lawmakers to rest upon such a precarious foundation as this? Surely not. Yet if the contention that

the office ceased to exist at the time the city acquired the given population, regardless of the time of an official determination of that fact, and that an official determination of such fact relates back to the time when the city acquired such population, can be upheld, it would logically follow that not only the tenure by which the office is held, but the very existence of the office, might rest for years upon this unknown and unofficially determined fact.

We are of the opinion that, in the eyes of the law, for the purpose of determining the number of its justices of the peace therein, the city of Puyallup did not have more than 5,000 inhabitants at the time of the election of 1908, nor in any event until it was officially so determined in April, 1909, regardless of the real fact as to its population. From this view it necessarily follows that at that election D. A. Whitman, in whose place respondent was appointed, and M. L. Brooks, appellant, were both legally elected, not to the salary office, but to the two fee offices of justice of the peace. These were not only the offices to which both appellant and respondent were elected and appointed, but are the offices to which they both qualified, by filing their oaths and bonds, before there was any official determination that the city had more than 5,000 inhabitants. The question then is, do these two offices continue to exist after the judicial determination of the city's population in April, 1909, and until the end of the term for which appellant and respondent were elected and appointed? If the offices do so continue in existence, then it is plain that neither can cause the other to be ousted, because neither is usurping the office he holds.

Our attention is called to the case of *Ogden v. Chehalis County*, 41 Wash. 45, 82 Pac. 1095. That case involved the question of the right of a justice, in a city reaching 5,000 population after his election and before the expiration of his term, to a salary, as against the county, which question, however, we are not here concerned with. But that case also

inferentially supports the view that the two justices elected before the city acquired 5,000 inhabitants continue to hold office to the end of the term for which they are elected, even though the city acquires 5,000 inhabitants before the expiration of the term. The same may be said as to one appointed to fill such unexpired term, as the respondent was appointed in this case. We are of the opinion that this is the correct view, and that it was not the intention of the legislature to have the law work a change in the tenure of office of justices in cities during the term for which they are elected or appointed. Nor was it the intention of the legislature to have the change from two justices to one justice occur except at the end of a regular term. It will be noticed that the language of Rem. & Bal. Code, § 6632 is, "There shall be elected at the general election to be held in November, 1898, and biennially thereafter in cities of more than five thousand inhabitants only one justice. . . ;" from which we conclude that there is no office of a single justice as contemplated by this law until after the time for holding an election for that purpose has passed. Neither of these officers were elected at such biennial election in a city of more than 5,000 inhabitants, nor appointed as a successor of one so elected. The transition in such a city from two justices to one justice must have been intended by the lawmakers to occur at some certain definable time. We are unable to reach any conclusion other than that such time is at the end of a term of office next following some official determination of the fact that the city has more than 5,000 inhabitants.

Being of the opinion that both appellant and respondent are legally qualified and acting justices of the peace in the city of Puyallup, it follows that neither can be ousted, and we conclude that the judgment of the learned superior court must be reversed. This disposition of the case eliminates the question of the right of one to the compensation which may have been received by the other; and as to the compensation

either is entitled to receive from Pierce county, we are not called upon to express an opinion.

The judgment is reversed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8843. Department Two. June 6, 1910.]

EDWIN B. PILLSBURY *et al.*, *Respondents*, v. S. T. BERESFORD, *Appellant*.[1]

TAXATION—TAX DEED—ACTION TO SET ASIDE—EVIDENCE OF TITLE. A nonresident plaintiff in an action to set aside a tax deed is sufficiently identified as the grantee in a recorded deed from the conceded holder of the title, where he testified that he purchased the lot from such holder, paid for it, and produced tax receipts showing payment by him of taxes thereon, and that he lived in the state given as the residence of the grantee in the deed.

SAME—CONDITION PRECEDENT—TENDER OF TAX. A tender of taxes as a condition precedent to an action to set aside a tax deed is excused where it appears that the defendants claimed title to the land and plainly indicated that any tender would be refused.

PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Rem. & Bal. Code, § 9254, subd. 2, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

SAME—JUDGMENT—SERVICE OF PROCESS—EVIDENCE. In an action to set aside a default judgment in a tax foreclosure, a finding that there was no summons other than a defective publication shown by the files is warranted where the defendants in the foreclosure were nonresidents, did not enter any appearance, or know of the action and were not personally served, the files show no other service than the defective publication, and there was no affirmative showing that any other service was made.

COSTS—DISBURSEMENTS—DEPOSITIONS. Under Rem. & Bal. Code, § 482, authorizing the allowance of costs for the necessary expenses of taking depositions, to be proved by affidavit, costs may be taxed for the notary's fees, although he failed to indorse the same on the deposition; and also for depositions taken on stipulation containing no provision for such taxation.

[1]Reported in 109 Pac. 193.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 13, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Byers & Byers, for appellant.

O. L. Willett, for respondents.

PARKER, J.—This is an action to remove a cloud, consisting of a tax deed, upon plaintiffs' title to a lot in Seattle. Upon a trial before the court, findings were made and decree rendered in favor of the plaintiffs. The defendant has appealed. The facts as found by the learned trial court are, in substance, as follows: Respondent Edwin B. Pillsbury is, and has been since the year 1891, the owner of the lot involved. In November, 1899, the treasurer of King county issued a certificate for delinquent taxes upon the lot to the appellant, who then paid all taxes due thereon. In January, 1901, appellant began an action in the superior court for King county against respondents to foreclose his certificate of delinquency. The only summons or notice ever issued or attempted to be served in that action was addressed to the respondents, who were defendants therein, requiring them to appear and defend within sixty days after the service of such notice upon them. Summons or notice was never served upon either of the respondents other than by publishing it in a newspaper in King county. On April 26, 1901, there was entered a judgment by default in that action, foreclosing appellant's certificate of delinquency and directing a sale of the lot. Thereafter, in pursuance of that judgment, the treasurer of King county sold the lot to appellant and executed a tax deed therefor in usual form. This deed constitutes the cloud upon respondents' title which is sought to be removed by this action.

Prior to and for a long time after the commencement of

this action, the appellant concealed himself in the city of Seattle to prevent the tender to him of any money due him for taxes paid upon the lot. Prior to the commencement of this action, the respondents caused to be made diligent search to find appellant, and endeavored to make tender of money due him for taxes paid upon the lot, but were unable to find appellant. Respondents have been ready and willing to pay appellant whatever sum was justly due him on account of taxes. The trial court found the amount due appellant on account of such taxes, and made provisions in its decree securing payment of the same to appellant.

In addition to the foregoing facts shown by the findings and decree, the following is shown by the record. The respondents allege in their complaint facts showing their efforts to find appellant and to make tender to him, in substance as above stated, and also allege that they are "ready and willing to pay the amount justly due said defendant for taxes paid by him on said premises." Appellant was served by publication in this action, and thereafter answered and set up his ownership of the lot. It is plain from the record that appellant would have at all times refused to accept or consider any tender from respondents. Respondent Edwin B. Pillsbury claims to have acquired title to the lot in 1891, prior to his marriage, which occurred in September, 1892.

Learned counsel for appellant contend that the proof fails to show that respondent Edwin B. Pillsbury is the owner of the lot, except for the tax deed, and that respondents are therefore not entitled to maintain this action. Respondents are nonresidents of the state and were not present at the trial. Their counsel offered in evidence the record of a deed in the auditor's office of King county purporting to convey it, on October 30, 1891, to "Edwin B. Pillsbury, of Detroit, Michigan," from the owners of the addition in whom it is conceded good title was then vested. Mr. Pillsbury testified in his deposition that he purchased the lot about 1890 from James A. Moore, one of the owners of the addition, making

a part payment thereon, and later completed his payments and received a deed therefor. While this evidence was admitted over the objections of the counsel for the appellant, made upon the ground that "it was not the best evidence," no exception was taken to the court's ruling in admitting it. It was, in any event, admissible as tending to identify Pillsbury as the grantee named in the recorded deed. Mr. Pillsbury produced, and made part of his deposition, certain tax receipts showing payment of taxes by him upon the lot in the year 1892. The evidence does not show where Mr. Pillsbury lived when this deed was made in 1891, but it does show that he was married at Detroit, Michigan, in September, 1892, and that he then went to Jackson, Michigan, to reside. The original deed was not produced in evidence. It is argued that this evidence does not identify Mr. Pillsbury as the grantee in this recorded deed. We are of the opinion, however, that it constituted a sufficient *prima facie* showing of his ownership to entitle him to attack the validity of the tax judgment and deed based thereon, and the evidence offered by appellant was clearly insufficient to overcome this *prima facie* showing.

It is contended that there was no proof of any tender by respondents to appellant prior to the bringing of the action. In view of the fact that the appellant has at all times claimed title to the land, and has at all times plainly indicated that a tender would be refused by him, the respondents were relieved from the necessity of proving a tender. *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459, and cases cited.

It is further contended that the proof does not support the finding that there was no summons or notice in the tax foreclosure case other than the one we have mentioned requiring the defendants therein, these respondents, to appear and defend within sixty days after service of such notice. It is settled, by our prior holdings, that a summons to be served by publication in this form is void and gives no jurisdiction to render judgment. Rem. & Bal. Code, § 9254, subd. 2;

Thompson v. Robbins, 32 Wash. 149, 72 Pac. 1043; *Gould v. White*, 54 Wash. 394, 103 Pac. 460.

It is not seriously claimed that this summons is valid. It was proven that there was no personal service of any summons upon Pillsbury or his wife in the tax foreclosure case; that they did not enter any appearance in that case, and did not know of its existence until long after the rendering of judgment therein; and that the records and files of that case fail to show the issuing or serving of any summons therein other than the void one above mentioned. There was no affirmative showing by appellant that there was ever any other summons issued or served in the case. Under our holding in *Gould v. White, supra*, these facts made out a *prima facie* case in behalf of respondents, and there being no affirmative proof to overcome it, the trial court was, therefore, fully warranted in finding that no other summons was ever issued or served in the case.

It is also contended that the trial court committed error in refusing to strike from the cost bill certain items consisting of notary's fees incurred by respondents in taking depositions, upon the ground that such fees were not indorsed upon the deposition by the notary, and also that they were not properly taxable. Rem. & Bal. Code, § 482, expressly provides that:

"The prevailing party, in addition to the allowance of costs, . . . shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expense of taking depositions, by commission or otherwise, . . ."

and the same section further provides for the proving of the amount of such disbursements by affidavit, in which manner they appear to have been proven in this case, which affidavit is not denied. Our attention has not been called to any statutory provision requiring the endorsement of the fees on the deposition by the officer taking it. It is also argued that one of the depositions was taken upon stipu-

lation wherein no provision was made that the expense of taking the same should be taxed, but we think this is no reason for refusing to tax the expense of taking the deposition as disbursements. This contention is analogous to an attempt to have the court refuse the allowance of a witness fee because the witness came into court and testified without being formerly subpoenaed, which fact this court held in *Christensen v. Union Trunk Line*, 6 Wash. 75, 83, 32 Pac. 1018, did not affect the witness' right to compensation or the question of its being taxed as disbursements. We think this expense was taxable as disbursements in favor of respondents.

Other alleged errors discussed by appellant's counsel would not affect the result. We are of the opinion that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8645. Department Two. June 7, 1910.]

HUNTER TRACT IMPROVEMENT COMPANY, *Appellant*, v. S. H. STONE *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—CONTRACT—ASSIGNMENT—CONSENT OF VENDOR. A contract for the purchase of land is assignable by the vendee without the consent of the vendor, where there were no special circumstances in the contract to indicate an intention of the parties that it was not assignable, but on the contrary it contained a clause to the effect that, wherever the words vendor or vendee appear, it is understood to include heirs, assigns, successors, etc.; and it is immaterial that on the back of the contract, after a form for an assignment, there was a recital for acceptance and approval of the assignment; since it was no part of the contract, and simply a provision for a novation.

Appeal from a judgment of the superior court for King county, Main, J., entered November 13, 1909, upon findings in favor of the defendants, dismissing an action to cancel an assignment of a contract, after a trial on the merits before the court. Affirmed.

[1]Reported in 109 Pac. 112.

Hughes, McMicken, Dovell & Ramsey, for appellant.
Andrew R. Black, for respondents.

DUNBAR, J.—Appellant platted, as Mount Baker addition to the city of Seattle, a tract of land adjoining Lake Washington, containing about two hundred and ten acres, and gave to the city of Seattle about twenty-five acres of this land for parks and boulevards, including the lake frontage, and in other ways attempted to make it desirable for first-class residences, and a great many people had bought lots in said addition. One Marguerite Foy had secured a contract for the purchase of lot 14 in block 18 in said addition, and had assigned the same to a woman of the negro race, Susie Stone, wife of the respondent S. H. Stone, who is also a negro. The assignment was approved on the back of the contract, and said S. H. Stone and wife, Susie Stone, were about to commence the erection of a private residence for themselves on said lot. Thereupon the appellant brought this action against S. H. Stone and wife and Marguerite Foy, respondents herein, to obtain a cancellation of said assignment to Susie Stone, upon the ground that the contract made with Marguerite Foy could not be binding until the assignment should be accepted and approved by the appellant, and that the purported approval and acceptance of the assignment to Susie Stone was induced by mistake as to the race of said Susie Stone and of her husband, and that the said Susie Stone and her husband wilfully and wrongfully concealed from the appellant the fact that they were of the negro race, knowing all the time that the appellant would not consent to or approve of the assignment to a person or persons of the negro race.

There were other provisions of the complaint in relation to the failure to pay interest, but it was conceded upon the trial that the interest had been paid, and this ground for rescission is abandoned upon this appeal. The answer admitted the assignment, admitted the fact that the respond-

ents Susie Stone and S. H. Stone were colored people, but denied all allegations of knowledge of the conditions asserted in the complaint, or of any fraud on their part. The court upon the trial of the cause found in favor of the defendants, and dismissed the action. From judgment of dismissal, this appeal is taken.

It is the appellant's contention that it is injured from the fact that the addition will become less popular and less valuable if negroes are allowed to erect and maintain residences in said addition, and that it had promised and agreed with divers and sundry parties to whom it had sold that negroes would not be allowed to purchase any of the lots of this addition or to maintain residences thereon. The main contention is based upon the first assignment of error, viz., that the court refused to find that it was agreed by the parties to the contract, and so set forth therein (referring to the contract between Marguerite Foy and appellant), that no assignment of the said contract, or of any rights thereunder, should be valid until the same should be accepted and approved by this plaintiff, and this finding requested was in accordance with paragraph 4 of the complaint. We do not think the court erred in not making this finding as requested. A great many other assignments are discussed by the appellant, which it seems to us are not material, in consideration of the conclusion we have reached on the assignment just mentioned. It may be conceded that the general propositions of law stated by the appellant are correctly stated, and that the authorities cited sustain such proposition, viz., that the parties to a contract may in terms prohibit its assignment so that neither personal representatives nor assignees can succeed to any rights in virtue of it or be bound by its obligations; or that a party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. But these principles, and authorities cited to sustain them, are not in point as we view this contract.

Appellant quotes somewhat extensively from the case of *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. 179, where a contract by which A. agreed to sell, and B. to buy, all the grapes of a certain standard which A. might raise in a certain vineyard during a certain period, was declared to be assignable by A. But in the course of the opinion, the court used the language set forth in appellant's brief, to the effect that, though a contract may not expressly say that it is not transferable, yet if there are equivalent expressions or language which excludes the idea of performance by another, it is not assignable; citing *Shultz & Co. v. Johnson's Adm'r*, 5 B. Mon. (Ky.) 497. An examination of that case shows that S. contracted with J. to receive, and pay for at a certain price, all the hemp which J. could raise for six successive years on not less than one hundred or more than one hundred and sixty acres of land, *of his own raising*. J. died, and in a suit by his administrator for refusing to receive and pay for a crop raised after the death of J., held that the contract was personal and that it could not be performed by J's administrator, the court holding that there was a personal equation in that case which could not be disregarded; that S. contracted with reference to the requisite skill and experience which J. was known to possess, and that by the especial terms of the contract he could not be compelled to take the production of any one else. But the court, in *La Rue v. Groezinger*, *supra*, shows conclusively by its announcement that it would not have held such a contract as the one in question non-assignable, for it proceeds to say:

"If the language does not exclude the idea of performance by another, and the nature of the thing contracted for, or the circumstances of the case, do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract,—then the contract was assignable, under the provisions above quoted. . . . And while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea

of performance by another, yet in the absence of anything indicating such an intention, we do not think that the courts should indulge in speculation as to possible prejudice or fancied preference. It should not assume that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under similar circumstances."

The whole opinion is an argument against appellant's contention.

But instead of there being special circumstances in this contract to indicate that the intention of the parties was that it should not be assignable, the contract itself expressly provides for an assignment in the eighth clause, which is as follows: "Where the words vendor or vendee appear, it is understood to include heirs, assigns, successors or legal representatives." It is true that, after the form of assignment on the back of the contract, the following words appear: "This assignment is hereby accepted and approved." But this is no part of the contract. The contract was completed, signed, and acknowledged by the parties, and this provision was not incorporated in that agreement, and the parties to the contract can in no way be bound by it. It was evidently incorporated simply as a provision for a novation, and for the purpose of releasing the original contractor and accepting the obligation of the assignee in lieu thereof. There being, then, no obligation on the part of the assignee to have this assignment approved, it is immaterial whether the approval was made through mistake or otherwise. Certain it is that there would have been no protection to the appellant under this contract, in respect to the condition it is complaining of, if it had executed a deed to Marguerite Foy, and she had seen fit to deed the same to the respondents Stone, or to make any contract that she saw fit to make with relation to the land.

We think there is no merit in the appeal, and the judgment must be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8682. Department One. June 9, 1910.]

J. E. Forsman, *Appellant*, v. Seattle Electric Company, *Respondent*.[1]

Master and Servant—Assumption of Risks—Reliance on Directions—Unloading Heavy Objects—Question for Jury. A common laborer, assisting in unloading from a wagon a barrel of tar weighing five or six hundred pounds, without previous experience, or knowledge of the weight, may rely on the superior knowledge of the master and act as directed, and does not, as a matter of law, assume the risk of an injury from an unsafe method of unloading, whereby his hand was crushed because he was unable to bear the weight which bore upon him while acting as directed in lowering the barrel to the ground.

Appeal from a judgment of the superior court for King county, Gay, J., entered November 22, 1909, in favor of the defendant, upon granting a nonsuit in an action for personal injuries sustained by an employee engaged in unloading barrels of tar. Reversed.

Reynolds, Ballinger & Hutson, for appellant.

James B. Howe and *H. S. Elliott*, for respondent.

Gose, J.—The plaintiff brought this action to recover damages for personal injuries sustained while in the service of the defendant. At the close of his testimony the court, upon the motion of the defendant, dismissed the case. Plaintiff has appealed.

The respondent was engaged in cement and brick work upon the public streets of Seattle. The basis of the appellant's claim for relief is that, at the time of the happening of the accident, he was working for the respondent as a common laborer; that he had been so employed for something over a day; that while engaged in wheeling sand, he was called by the respondent's foreman to assist in unloading three barrels of tar from a dump wagon; that two of the

[1]Reported in 109 Pac. 121.

barrels were set upright in the wagon, and the third, which was placed crosswise between the two, had become lodged or, as it was variously expressed by the witnesses, "jammed," "squeezed," or "pinched" between the upright barrels; that the foreman directed him to get in the wagon and assist three other men in dislodging it; that he did so, and the barrel was rolled on the rear of the wagon; that the foreman then directed him to stand on the ground and assist in unloading; that three men remained in the wagon, one at each end of the barrel, and the third in the center, and the three men upon the ground took like positions; that the appellant was holding one end of the barrel and that, in lowering it from the wagon to the extension of the brake beam, a distance of about two feet, he was unable to hold the weight which bore upon him, and that his finger was crushed between the brake beam and the edge of the barrel; that the barrels weighed five or six hundred pounds each, and that the usual way of unloading them was to drop them from the wagon to the ground, but that owing to the slope of the street, and to prevent the rolling of the barrels and possible injury to people, the usual method was not followed. In addition to the facts stated, the appellant testified that he had had no previous experience in that kind of work; that when he took hold of the barrel in the wagon to assist in dislodging it, it moved easily; that he did not know its weight and that the foreman said that it was light, and that "I took his word for it."

The governing principles of law are well settled in this class of cases, but the difficulty lies in their proper application. The master commands and the servant obeys, and he has a right to rely upon the superior knowledge of the master and to act as directed, unless the danger in doing so is so open or apparent that a man of ordinary prudence would discern the danger and refuse obedience. If the appellant did not know the actual or approximate weight of the barrel, he did not assume the risk as a matter of law. His position, as

we have said, was one of subordination. Obviously he had a right to rely upon the superior knowledge of the master as to the weight of the barrel, in the absence of knowledge upon his part, or notice of facts from which the law would presume knowledge, and to assume that the master would not put him in a place of peril. It cannot be declared, as a matter of law, that the appellant knew the actual or approximate weight of the barrel, or that he had knowledge of facts from which the law would impute knowledge. This question should have been submitted to the jury. There is abundant evidence to warrant the jury in concluding that the method employed in unloading the barrel was both unusual and unsafe. The weight of the barrel was the proximate cause of the injury. The appellant was injured because he was not able to hold the weight which bore upon him. Among other cases, the respondent relies upon, *International & Great Northern R. Co. v. Figures*, 40 Tex. Civ. App. 255, 89 S. W. 780; *Brown v. Oregon Lumber Co.*, 24 Ore. 315, 33 Pac. 557; *Dunlap v. Barney Mfg. Co.*, 148 Mass. 51, 18 N. E. 599; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Bryan v. Southern R. Co.*, 128 N. C. 387, 38 S. E. 914; and *Nephew v. Whitehead*, 123 Mich. 255, 81 N. W. 1083.

In *International & G. N. R. Co. v. Figures*, the plaintiff and another, at the instance of the master's foreman, undertook to take up and load into a car a piece of iron twelve inches square, about six feet in length, and weighing 575 pounds. The iron fell, injuring the plaintiff. The plaintiff had handled scrap iron and steel rails, and was familiar with the work. The court correctly said that, if the plaintiff did not know, and by the use of ordinary care could not have discovered, the danger before taking hold of the iron, the danger in two men undertaking to lift and load it into the car became apparent when he undertook to raise it, and that there was no liability. In *Brown v. Oregon Lumber Co.*, the right to recover was denied where the plaintiff was injured while loading ties in a car. The ties were piled nine or ten high.

It was shown that the usual mode of piling the ties was by blocking them as they were piled, and that this mode was pursued until the last car was partially loaded when, at the command of the foreman to hurry, the plaintiff and those employed with him ceased blocking, when the pile fell and struck and injured the plaintiff. The court said that the risk of doing the work was open and apparent. In *Dunlap v. Barney Mfg. Co.*, the plaintiff and two others were attempting to lift steps weighing twelve to fourteen hundred pounds upon a low truck, when one of the parties lost his hold and the steps fell upon the plaintiff, causing the injury. It was held that, if there was any negligence, it was that of the plaintiff or his fellow servant. In *Worlds v. Georgia R. Co.*, the right to relief was denied the plaintiff, who was injured while carrying cross ties without assistance upon the command of the yard master. In *Bryan v. Southern R. Co.*, the plaintiff, a carpenter, was injured by the slipping and falling of a heavy timber, which he and others were attempting to load upon the car under the direction of the foreman. In *Nephew v. Whitehead*, the plaintiff, who was experienced in the work he was engaged in, was denied relief for an injury sustained while assisting others in unloading heavy iron beams from a truck which he had helped to load.

These cases are readily distinguishable upon the facts. Where a party undertakes to raise a heavy body from the ground, he has notice of the weight before the danger period arrives. It is very different, however, where one undertakes to unload an object from a wagon or a car, and has no notice other than the appearance of the object, until the weight is upon him and the danger period at hand. In brief, in the one case he can desist when the danger becomes apparent, and in the other he cannot.

The judgment is reversed, with directions to grant a new trial.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 8745. Department One. June 9, 1910.]

JOHN M. BOYLE *et al.*, *Appellants*, v. MARY OLESON *et al.*, *Respondents*.[1]

EQUITY—LACHES—ESTOPPEL. Where a divorced wife acquiesced in a property settlement releasing her husband of all claims and demands, and in a decree of divorce finding that there was no "common property," for a period of seventeen years and died without making any claim to other property acquired by the husband for a small sum prior to the decree and settlement, although she knew three years before her death of the time of the acquisition of such other property, she and those claiming under her thirty years after the settlement are estopped by laches from claiming that such other property was the common property of the husband and wife; he having improved it and claimed it as his separate estate.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 18, 1910, upon findings in favor of the defendants, in decreeing the final settlement and distribution of a decedent's estate, after a hearing on the merits before the court. Reversed.

Boyle, Warburton & Brockway, Lund & Lund, and *F. Campbell*, for appellants.

Frank D. Nash and *John Leo*, for respondents.

GOSE, J.—This proceeding was heard in the superior court, sitting in probate, at the time of the final settlement of the account and the distribution of the estate of John P. Kirby, deceased, upon the petition of four of the daughters of the deceased, one of whom, Anna R. Kile, died pending the proceeding. The issue presented for determination is, whether certain property situated in the city of Tacoma was the separate property of the deceased or the common property of the deceased and his widow, Ann Kirby, from whom he was divorced in 1878, and who died in 1896. All the parties stip-

[1]Reported in 109 Pac. 203.

ulated that this question should be determined by the trial court, and no jurisdictional question is now raised. Certain property was adjudged to be common property, and a decree was entered accordingly. The devisees and legatees under the will of John P. Kirby have appealed.

Ann Kirby died intestate in San Francisco, California, in 1896, having before her death divided all the property owned by her, or to which she claimed title, between her children. John P. Kirby died testate at the same place in 1905. At the time of his death he was a resident of Pierce county, in this state, and his will was regularly proven and admitted to probate there, and his estate has proceeded to final settlement and distribution. In his will he failed to name two of his grandchildren, but their rights are conceded.

The appellants contend that the findings of the court are not in harmony with the conclusions of law; and that the findings and the evidence require an adjudication that all the property in this state was the separate property of the testator. We think this contention must be upheld. The facts found which are essential to a consideration of this question are, that John P. Kirby and Ann Kirby intermarried in the state of Massachusetts in 1855; that they later came to San Francisco; that in 1870 John P. Kirby came to this territory and acquired a preemption claim at La Conner; that on September 6, 1878, a decree of divorce was entered in the third judicial district at the suit of John P. Kirby, whereby the marriage bonds between him and Ann Kirby were dissolved; that the referee found "that there is no common or copartnership property of plaintiff and defendant"; that in 1879 Ann Kirby filed a petition in the divorce proceeding to set aside the decree; that pending the petition she and John P. Kirby entered into an agreement of settlement in the language following:

"Memorandum of an Agreement, made and entered into at the city and county of San Francisco, state of California, this 16th day of August, 1879, between John P. Kirby, of

La Conner, Whatcom county, Washington Territory, party of the first part, and Ann M. Kirby, of the city and county of San Francisco aforesaid, party of the second part;

"Witnesseth, That whereas the party of the first part on or about the 30th day of June, 1878, obtained a decree of divorce from the party of the second part in the district court of said territory, for the Seattle district, and

"Whereas, The party of the second part has since taken proceedings in said court to set aside said decree and to obtain a decree of said court awarding certain lands at La Conner aforesaid to the party of the second part, and

"Whereas, It has been agreed between the parties hereto that said proceedings on the part of the party of the second part shall be discontinued and all matters in difference between them settled;

"Now in consideration of the premises the party of the first part hereby agrees that he will forthwith execute to the party of the second part a deed of conveyance of one-half of the preemption claim of the party of the first part situate at La Conner aforesaid, and consisting of 86 acres, more or less, of land, and being the north half of said preemption claim;

"And in consideration of said conveyance of land the party of the second part hereby agrees to discontinue forthwith all proceedings to vacate or set aside said decree of divorce, and all other proceedings either at law or in equity against the party of the first part, and also accept the said decree as a valid and binding divorce between the parties hereto.

"And it is further hereby agreed that each of the parties hereto shall bear their own costs and expenses in said hereinbefore mentioned proceedings in the district court;

"And it is further hereby agreed, and these presents witness, that each of the parties hereto have released the other from all claims and demands whatsoever to the date hereof";

that the divorce remained in full force and effect; that pursuant to the agreement, John P. Kirby conveyed to Ann Kirby one-half of the preemption claim, consisting of about eighty-seven acres, which she received and later sold, appropriating the proceeds to her own use; that she died intestate in San Francisco in 1896, dividing her California property between her children before her death, but not mentioning or

disposing of any property in this state; that she did not remarry; that in 1877 John P. Kirby purchased lots 25 and 26 in block 1506 in the city of Tacoma, paying therefor $250, and recording the deed in October, 1878, after the entry of the decree of divorce and before the settlement; that the lots with the improvements are now of the value of $70,000; that neither Ann Kirby nor the petitioners have ever paid, or offered to pay, any taxes or assessments against the property; that John P. Kirby erected buildings upon the property of the value of $10,000, and paid all taxes and assessments thereon; that a short time after the death of John P. Kirby the deed to the lots came into the possession of the petitioners, and they thereafter "upon investigation being made, first learned that said property was acquired prior to the date of the entry of the decree of divorce"; that Ann Kirby never resided in this state.

From the facts stated it will be observed that, after 1870, Ann Kirby was a resident of the state of California, and John P. Kirby was a resident of this territory and state; that the property which is asserted to be common property was acquired in 1877, before the date of the decree of divorce; that the deed by which it was conveyed was filed for record in 1878, after the entry of the decree and before the articles of settlement were executed; that the property was purchased for $250, and by the improvements placed upon it by the husband and the growth of the city, it had increased in value to $70,000, at the time of the trial; that from the settlement in 1879, whereby each party released the other "from all claims and demands whatsoever," to the death of the wife in 1896, a period of seventeen years, she acquiesced in the settlement and the divorce decree based upon a finding that there was no "common property," the term then employed by the statute for what is now designated community property, and that she accepted "the said decree as a valid and binding divorce." The evidence shows conclusively that she thereafter conveyed property as the widow of John P. Kirby, and that in 1893, three

years before her death, both she and the petitioners were advised that the property in controversy was purchased by the husband before the entry of the divorce decree; that the petitioners remained inactive until the commencement of this proceeding in 1909, thirty years after the settlement, and that John P. Kirby at all times exercised and asserted absolute ownership over the property.

Without considering the effect of the finding in the divorce proceeding that there was no common property, based upon a complaint containing that averment, and without considering the statute of limitations, we think that the petitioners are estopped by the laches and acquiescence of their mother to maintain this proceeding. The finding of the trial court that the respondents first learned that the property was acquired before the entry of the decree of divorce, after the death of John P. Kirby, as we have stated, is not supported by the evidence. As early as 1890 they knew that the father was claiming and asserting title to the property. In 1893 the mother visited the respondents at Tacoma, when some of them were living upon the property as tenants of John P. Kirby, and she and the respondents were advised then, or a short time thereafter, that the property was purchased before the decree was entered. If the mother was content to accept the settlement as final both before and after she had notice of the time the property was acquired, the respondents, who can only claim through her, cannot be heard after a lapse of thirty years, and after the death of all the parties to the transaction, to question its conclusiveness. Courts of equitable cognizance have ever frowned upon stale demands, and refused relief where rights have been asserted by one party and acquiesced in by the other for such a length of time and under such circumstances as to make it inequitable to permit the apparent and asserted right to be disturbed. It follows from what we have said that the widow was estopped at the time of her death by her laches and acquiescence, and that

those in privity with her occupy the same position. *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060.

We conclude, therefore, that all the property in controversy was the separate property of the deceased, and that it should be distributed according to the will, except as to the grandchildren not named in the will, whose rights are admitted and were protected in the decree. The decree is reversed, with directions to distribute the property in conformity with this opinion.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

[No. 8636. Department One. June 10, 1910.]

C. H. WEED, *Respondent*, v. H. E. FOSTER, *Appellant*.[1]

CHAMPERTY AND MAINTENANCE—DEFENSE—WHEN AVAILABLE. In an action upon a guaranty of an assignment, the defense that the assignment was champertous is not available, since a champertous contract can be relied upon as a defense only in an action wherein it is sought to be enforced.

SAME—CONTRACTS CONSTITUTING—ASSIGNMENT OF CAUSE—BARRATRY. An assignment of a part of a recovery arising out of an alleged tort, in consideration of advancing money for costs, is not champertous; especially in view of Rem. & Bal. Code, § 2970 defining barratry as wilfully maintaining suits in which a party has no interest.

APPEAL—REVIEW—INSTRUCTIONS. It is not error to refuse to give requested instructions covered in the general charge.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 16, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

George W. Saulsberry, for appellant.

Alexander & Bundy, for respondent.

[1]Reported in 109 Pac. 123.

Morris, J.—On June 21, 1904, appellant represented the libelants in an action then pending in the United States district court for the district of Washington. The character of this proceeding does not clearly appear in the record before us, but from what is said we gather that it was an attempt on the part of numerous libelants to enforce a cause of action for damages against a steamship for breach of the carriage contract. The proceeding was referred to a commissioner to take the evidence, and in this connection costs and expenses had been incurred in preparing the transcript to the amount of $278.40, which it was necessary to pay before the transcript could be obtained and filed. Respondent agreed to furnish this sum and, in consideration thereof, the following assignment was handed him:

"In the District Court of the United States, District of Washington.

"George W. Sweet *et al.*, Libelants, No. 2587.
vs. Assignment of
"The Sailing Steamer Nome City. $378.40.

"For value received the libelants in this case do hereby assign, transfer and set over to C. H. Weed of the City of Seattle, County of King, and State of Washington, three hundred and seventy-eight and 40-100 ($378.40) dollars, the same to be paid to said C. H. Weed out of the recovery in this cause and before the libelants are entitled to receive any recovery.

"Dated Seattle, June 21st, 1904. H. E. Foster,
"Proctor for Libelants."

Respondent seemingly was not satisfied with this writing; whereupon appellant wrote thereon:

"I hereby guaranty unto the said C. H. Weed two hundred seventy-eight and 40-100 dollars. H. E. Foster."

The suit was unsuccessful, and respondent sought payment of the $278.40 advanced by him. He received two payments, one of $20 and the other of $10, and in March, 1909, he commenced this action against appellant, in which he seeks to hold appellant upon his written guaranty for the balance due him.

Appellant answered, claiming that he was only to act for respondent in collecting the money advanced by him from the libelants, and that the money was paid to procure an interest in the litigation in case of a recovery, and for the purpose of carrying on and prosecuting the suit. The cause came to trial before a jury, and resulted in a verdict for plaintiff, and defendant appeals.

Several errors are assigned, but they all raise the same contention—that there could be no recovery because the assignment was champertous. The cause of action pleaded, and upon which recovery was sought, was not based upon the assignment, but upon appellant's agreement to reimburse the respondent. The assignment was set out in full in the complaint, but it is apparent it was only pleaded by way of inducement. No liability was sought to be attached to it, nor any recovery based upon it. The recovery sought was upon a liability which was no part of the assignment, nor controlled or in any manner affected by it. The only part played by the assignment was its part in the history of the transaction leading up to appellant's promise or guaranty. A champertous contract can be relied upon as a defense only in some form of action wherein it is sought to be enforced. *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321. If the libelants had recovered in the Federal court, and respondent sought to enforce against them a claim for $378.40, as provided for in the assignment, then the action, being founded upon the assignment, would be subject to such defenses as might arise out of the character of the assignment. Assuming, however, that the action is based upon the assignment, in order to give appellant the benefit of his claims of error, its purpose and effect is to assign a recovery, or a part of a recovery, arising out of an alleged tort. Such assignments are not champertous in their nature, and have uniformly been recognized as enforceable contracts. *Vimont v. Chicago & N. W. R. Co.*, 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec.

132; *Gray v. McCallister*, 50 Iowa 497; *Snyder v. Wabash etc. R. Co.*, 86 Mo. 613; *Rucker v. Bolles*, 80 Fed. 504.

Although not so expressly held, it is apparent from the opinion of this court in the case of *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, and the authorities therein cited with approval, that the court was then of the opinion that the doctrine of champerty has never obtained a foothold in this state; or, if it ever had, in so far as it related to contracts between attorney and client, it had been repealed by Rem. & Bal. Code, § 474. Upon the same reasoning it might now well be said that, in so far as it relates to assignments of causes or parts of causes of action in consideration of advancing money to defray costs, it was annulled by Rem. & Bal. Code, § 2970, in force at the time of the making of this assignment and the commencement of this action. This section defines barratry and includes any person who wilfully maintains, prosecutes, or encourages the bringing of suits at law or in equity in which such person has no interest.

Other assignments relate to the court's refusal to give certain instructions requested by appellant. In so far as the requested instructions submitted the defense of champerty, they have been disposed of. The other requests related to the necessity of a separate consideration, in order to hold appellant, and that it must be found he was acting independently and not as attorney for the libelants in assuming his liability. These matters were fully and correctly covered by the court in its charge, and the refusal to give the instructions in the language of appellant's request was not error.

Finding no merit in any assignment of error, the judgment is affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Gose, JJ., concur.

[No. 8681. Department One. June 10, 1910.]

Julia E. Blinn, *Appellant*, v. Harry L. Grindle *et al.*, *Respondents*.[1]

Taxation—Tax Deed—Cancellation—Excuse for Failure to Pay Taxes. The negligence of the county treasurer prevented the payment of taxes and a county tax deed is void, where the owner attempted in good faith to pay taxes upon platted property, and on furnishing a list was informed by the county treasurer that all delinquent taxes were paid; and it is immaterial whether the lists furnished described the property by government subdivision as assessed at one time, or as it has been platted and assessed later.

Same—Actions to Cancel Deed—Limitations—Laches. An action to cancel a tax deed commenced within the time limited by Rem. & Bal. Code, § 162, is not barred by laches where there was nothing in the record upon which to predicate laches.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered August 19, 1909, dismissing, at the close of plaintiff's case, an action to cancel a tax deed. Reversed.

Peters & Powell and *Marion Edwards*, for appellant.

Faben & Kelleran, for respondents.

Gose, J.—In 1892 the property in controversy was assessed as the northwest quarter of the northwest quarter of section 10, township 24, north, range 5, E. W. M., and in 1898 a certificate of delinquency was issued to King county. The certificate was foreclosed in 1902, upon a service of summons by publication, in an action wherein the county was the plaintiff and "persons to whom assessed and all persons unknown, etc." were defendants, terminating in a sale of the property to the respondents' predecessor in interest in November, 1902, and the execution and delivery of a treasurer's deed in January, 1903. This action was commenced March 14, 1908, admittedly within the time fixed by

[1]Reported in 109 Pac. 122.

statute (Laws 1907, page 398; Rem. & Bal. Code, § 162), for the purpose of cancelling the tax deed. At the close of the plaintiff's evidence, the action was dismissed upon the motion of the defendants. The plaintiff has appealed.

The record shows that in May, 1891, the then owner of the property mortgaged it to the appellant; that the fee then passed to one McKnight, who with his wife in 1893 platted Mercer Slough Garden Tracts, of which the property in controversy formed a part, and caused the plat to be filed and recorded in the plat records of King county in October, 1893. The appellant foreclosed her mortgage upon the property, and a decree was entered therein in December, 1893, under which the property was sold to her in January, 1894. The sheriff conveyed the property to appellant in March, 1897. In the mortgage, the foreclosure thereof, and in the sheriff's deed, the land was described according to its government subdivisions. The taxes on the property for 1893 and subsequent years, to and including 1903, were paid by the appellant. The respondents paid the taxes for the years 1904-5-6-7. In 1893 the land was assessed as a government subdivision. In 1894 and subsequent years it has been assessed as Mercer Slough Garden Tracts.

The appellant asserts that she attempted in good faith to pay all taxes upon the property before the certificate of delinquency was issued, and that her failure to pay them, if she failed to do so, was due to the negligence of the county treasurer. We think this contention must be sustained. The evidence is convincing that the appellant at different times, prior to 1898 and thereafter, and before the certificate of delinquency was foreclosed, when paying her taxes, inquired at the county treasurer's office whether there were any delinquent taxes against the property, and furnished the treasurer a description of the property. It is not important whether the list furnished the treasurer described the property by government subdivisions or as it had been platted and was then carried upon the official books. Either de-

scription was sufficient. The court erred in dismissing the action. *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675; *Taylor v. Debritz*, 48 Wash. 373, 93 Pac. 528; *Gleason v. Owens*, 53 Wash. 483, 102 Pac. 425.

The respondents' contention that the plaintiff's cause of action is barred by her laches is not tenable. The action was commenced within the time limited by the statute, and there is nothing in the record upon which to predicate laches.

The judgment will be reversed, with directions to proceed with the trial in conformity with this opinion.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8750. Department One. June 10, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. ARTHUR W. GEORGE, *Appellant*.[1]

HOMICIDE—DEGREES—EVIDENCE—ADMISSIBILITY. In a prosecution for the murder of the accused's divorced wife, where evidence that the divorce was granted three years before on the ground of the husband's cruelty was admitted to show probable premeditation and a hostile mental attitude, it is error to refuse to allow the accused to rebut the same by proof of good will and apparent kindly feeling for a year previous to the homicide, in order to reduce the crime to the legal presumption of a lower degree.

EVIDENCE—OPINIONS—MENTAL ATTITUDE. The feeling or apparent mental attitude of people who are in frequent association may be shown by the opinions of acquaintances who had opportunity to observe and measure their emotions.

VENUE—LOCAL PREJUDICE—SHOWING. Upon a strong *prima facie* showing of local prejudice for a change of venue, the state should make a counter showing.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. It is not misconduct of counsel requiring a new trial for counsel for the state in argument to the jury to state his opinion that the accused is guilty of murder in the first degree.

[1]Reported in 109 Pac. 114.

APPEAL—REVIEW—INSTRUCTIONS. Error cannot be predicated upon the refusal to give requested instructions covered in the general charge.

Appeal from a judgment of the superior court for King county, Yakey, J., entered November 23, 1909, upon a trial and conviction of murder in the first degree. Reversed.

Thos. R. Horner and *J. L. Waller*, for appellant.

George F. Vanderveer and *John F. Murphy*, for respondent.

CHADWICK, J.—Arthur W. George, appellant, shot and killed his wife, Elizabeth George, on the 13th day of May, 1909. He was later convicted by a jury of the crime of murder in the first degree, and brings this case to our court upon several assignments of error. We shall discuss only those having merit.

After appellant had committed the crime of which he was convicted, he had some negotiations with Fred H. Peterson, Esquire, a member of the Seattle bar, with reference to his defense. Mr. Peterson had been his attorney in a divorce suit in which a decree of divorce had been rendered nearly three years before. For reasons not now material, Mr. Peterson declined employment, and the present attorneys were appointed by the court to defend the prisoner. Upon the trial, after proving the *corpus delicti*, the state called Mr. Peterson as a witness "to show," as stated by counsel, "there was feeling existing between the people; and I desire to prove by Mr. Peterson that he called the attention of defendant at that time to the relation that existed; that is, that he had been warned to keep away from his divorced wife after the divorce was granted; and I want to prove that the divorce was granted, by the original findings of the court." Counsel for appellant admitted in open court that a divorce had been granted, but the court held that the fact that a decree had been rendered, and that appellant had a right to visit his children under that decree, could not be admitted but must

be proved by the record. He accordingly admitted a copy of the decree, but rejected the findings of fact and conclusions of law when offered. Mr. Peterson was then permitted to testify that Mrs. George had objected to the frequency of the appellant's visits, and that he had undertaken the role of peacemaker, and had advised appellant to make his calls upon his children less frequent, to which appellant assented, agreeing to follow his advice "as near as he could."

Waiving the question of materiality and remoteness, it would be hard to predicate error upon the admission of this testimony if it were not for the subsequent rulings of the court. That the decree was put in evidence to show feeling or a hostile mental attitude on the part of the appellant, there can be no doubt; but accepting it as properly before the court, appellant would have the unquestionable right to rebut the presumption arising from the decree of divorce by any competent evidence. He endeavored to show by several witnesses, neighbors and friends of his wife, that the relations existing between himself and wife up to the time of the tragedy were amicable, and that there was, notwithstanding the decree of divorce, a bond of sympathy and affection between them. This was denied him. The general tenor of the evidence upon this point may be made manifest by quoting from the testimony of some of the witnesses:

Mrs. Newberry:

"Q. State if you know whether the attitude of Arthur George to Mrs. George and of Mrs. George to Arthur George in your presence and at their home was that of friendliness and kindness to each other or not. A. It was. Q. Was it such an attitude and were the actions to each other such as indicated they cared something for each other or not? Mr. Murphy: I object as calling for a conclusion. The Court: Sustain the objection. Mr. Horner: Save an exception. Exception allowed."

Mrs. Smith:

"Q. During your intimacy with Mrs. George and your acquaintance with Mr. George did you ever see any actions

or behavior on the part of Mr. George or of Mrs. George with the children that would indicate that there was any great affection existing between them? Mr. Murphy: I object to the question as calling for a conclusion. The Court: Sustain the objection. Mr. Horner: Save an exception. Exception allowed. Q. What loverlike action, if any, did you ever observe between Mr. and Mrs. George? Mr. Murphy: Same objection. The Court: Objection sustained. Exception allowed."

These witnesses and others had testified that appellant had spent every Sunday with his wife and children, meeting the children at Sunday school and taking them for a walk and afterwards remaining for dinner with the family. This is sufficient to show the attitude of the court towards the theory of the defense. Appellant was not only denied the privilege of showing that there was in fact no apparent ill feeling between him and his wife, but, when called as a witness in his own behalf, was interrogated on cross-examination by the state's attorney as to the grounds for the divorce; and it was made to appear to the jury that the divorce had, in fact, been granted upon the grounds of cruelty, the trial judge saying, over the objection of appellant, that it was proper to go into the grounds for the divorce, upon the cross-examination of appellant, to test his credibility as a witness.

If we could agree with the learned trial judge as to the grounds upon which this testimony was admitted, it might be that it would not be error. But the purpose—and it was not in any way concealed by the state—was to show that appellant had been cruel to the deceased, so that the jury might infer premeditation, deliberation, and malice. Clearly, appellant had a right to rebut this evidence. It requires no argument to show that, if the state could show ill feeling existing nearly three years before the tragedy, to show probable premeditation, thus raising the presumed crime from murder in the second degree to murder in the first degree, appellant should have the right to give evidence of good will

for a period of a year or more, to hold the crime to the legal presumption of second degree murder, or to reduce it to a lower degree. He was denied this privilege because, in the opinion of the trial judge, the questions asked called for the opinions of the witnesses. The feeling or apparent mental attitude of people who are in frequent association can be proved by the opinions of those whose acquaintance is of such character and duration as to give them an opportunity to observe and measure their emotions.

"In ordinary human dealings, the formation and expression of estimates as to another's mental state is constant and necessary. There is no good reason why testimony about it, based on personal observation of the other person's conduct, should not be admissible, so far as the opinion rule is concerned; for it is clearly impossible to remember and restate to the jury all the minute data of conduct and words which have served to convey the impression. Such was the orthodox common-law view; and such is the rule today perpetuated in most jurisdictions." 1 Greenleaf, Evidence (16th ed.), § 441h.

See, also, 2 Jones, Evidence, 362; 1 Wharton, Criminal Evidence, 511; Lawson, Ex. & Opinion Evidence, 520; *Blake v. People*, 73 N. Y. 586; *State v. James*, 31 S. C. 218, 9 S. E. 844; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Trelawney v. Colman*, 2 Stark. 191; *State v. Marsh*, 70 Vt. 288, 40 Atl. 836.

In *McKee v. Nelson*, 4 Cowen (N. Y.) 355, 15 Am. Dec. 384, a leading case, a question was put to a certain relative of plaintiff who had had an opportunity of observing her deportment, if in her opinion she was sincerely attached to defendant. The court said:

"We think the judge's decision founded in good sense, and in the nature of things. We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it like ordinary facts, as a matter of inference to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we

think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses, on this subject, must be derived from a series of instances passing under their observation, which yet they could never detail to a jury."

In the *Marsh* case it was said:

"Such impressions upon the witness' mind, produced by observing appearances and acts, is more in the nature of a resultant fact than a mere judgment or opinion derived from an attempted description of the appearances and acts. Such description rarely can convey the full force of the impression made by his observation of them upon the mind of the witness."

Reference to the books will show that it is under the same rule that an opinion as to the intoxication of an individual may be received. Although not the exact case, the principle upon which the proffered testimony was offered was affirmed by this court in *State v. Dolan*, 17 Wash. 499, 50 Pac. 472. The same principle sustains the case of *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489, wherein it was held that opinions as to the mental condition of a testator could be given, where the witnesses were acquainted with him in his lifetime and had means and opportunity to draw a just conclusion. There are cases holding to the contrary: *Leckey v. Bloser*, 24 Pa. St. 401; *State v. Brown*, 86 Iowa 121, 53 N. W. 92; and *Carney v. State*, 79 Ala. 14. In the last case the court admits the rule, but denies its application in the particular case. These cases are opposed to the overwhelming weight of authority, and, in our judgment, are unsound in principle.

It is also urged that the court erred in refusing a change of venue. A strong showing was made by the appellant in this behalf. We do not feel called upon to decide this point. There may have been a subsidence of the alleged hostile feeling toward appellant by this time. Inasmuch, however, as the showing seems to be *prima facie* sufficient, we feel warranted in suggesting that, in the event of a renewal of the

motion upon a new trial, if it be in King county, common prudence would dictate a counter showing on the part of the state.

Misconduct of court and counsel are also urged. The observations of the court which are the subject of complaint will, in all probability, not occur on a retrial; and the remark of counsel, "It is my sincere belief that defendant is guilty of murder in the first degree," made in argument to the jury, would not constitute reversible error under the authority of *Buckles v. Reynolds*, *ante* p. 485, 108 Pac. 1072.

Error is predicated upon the refusal of the court to give certain instructions. The subject-matter of the instructions refused was covered by other instructions, and appellant cannot complain.

Other errors assigned by counsel have become of no consequence in view of our holding. Judgment reversed, and the cause remanded for a new trial.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8791. Department One. June 10, 1910.]

In the Matter of the Application of J. W. PUTNAM *for a Writ of Habeas Corpus.*[1]

HABEAS CORPUS—GROUNDS OF RELIEF—UNCONSTITUTIONALITY OF STATUTE—ILLEGALITY OF PROCESS. Under Rem. & Bal. Code, § 1075, providing that on application for a writ of habeas corpus no inquiry shall be made into the legality of process whereby a party is in custody upon a warrant issued from the superior court on indictment or information, one in custody under a warrant issued upon an information for violating a statute is not entitled to release on habeas corpus on the ground that the statute is unconstitutional.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 12, 1910, denying an application for a writ of *habeas corpus* to release a person held

[1]Reported in 109 Pac. 111.

in custody upon a charge of selling intoxicating liquor without a license, upon sustaining a demurrer to the petition. Affirmed.

William C. Keith and *Blaine, Tucker & Hyland*, for appellant.

George F. Vanderveer (*The Attorney General* and *W. F. Magill, Assistant*, of counsel), for respondent.

FULLERTON, J.—This is an appeal from a judgment of the superior court of King county, denying an application for a writ of *habeas corpus*.

The petition for the writ was as follows:

"(1) That your petitioner is unlawfully imprisoned, detained, confined and restrained of his liberty by one Robert T. Hodge, sheriff of King county, Washington. That such restraint and detention is not by reason of any final judgment of a court of competent jurisdiction or by reason of any order adjudging your petitioner to be in contempt of any court, officer or other tribunal.

"(2) That your petitioner is illegally and unlawfully imprisoned, detained, confined and restrained of his liberty by the said Robert T. Hodge, sheriff of King county, Washington, under and by virtue of an alleged warrant of arrest. That said illegal warrant of arrest was issued by virtue of an illegal information filed by the prosecuting attorney of King county, Washington, in the superior court of said county, illegally and unlawfully charging your petitioner in said information with the offense of selling intoxicating liquors without first obtaining a license so to do from the state of Washington.

"(3) That the said information was filed by the prosecuting attorney for King county, charging your petitioner with the offense of selling intoxicating liquors, under and by virtue of an act of the legislature of the Laws of 1907, chapter 194, page 119, which said act is entitled 'An act relating to the sale of intoxicating liquors, fixing a state license fee and providing a punishment for the violation thereof.'

"(4) That said act of the legislature of 1907 is unconstitutional and illegal as applied to your petitioner in his

business as that of a druggist, and the information and warrant of arrest filed and issued against your petitioner under and by virtue of said act of the legislature are void and of no force or effect whatever."

A demurrer was interposed to the petition, which the court sustained, and thereafter, on the refusal of the petitioner to plead further, entered a judgment denying the application for the writ.

The application was properly denied. The statute relating to the issuance of writs of *habeas corpus*, in express terms provides that:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: . . .

"(3) Upon a warrant issued from the superior court upon an indictment or information." Rem. & Bal. Code, § 1075.

It can make no difference that the petitioner contends that the statute under which the state purports to proceed is unconstitutional, or has no application to one in his situation. The superior court before which the information is pending has jurisdiction and power to determine these questions, and the defendant must raise them in the pending proceeding, and appeal from the judgment if it be adverse to him, before he can ask this court to review the legality of the proceedings or the validity of the statute. *In re Hamilton*, 56 Wash. 405, 105 Pac. 1046; *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8775. Department Two. June 10, 1910.]

ALEXANDER McLIESH *et al.*, *Appellants*, v. JAMES BALL *et al.*, *Respondents*.[1]

JUDGMENT—COLLATERAL ATTACK—PAYMENT. It is not a collateral attack upon a judgment to show that a sale on execution thereunder was void because the judgment had been paid.

EXECUTION—SALE—PAYMENT OF JUDGMENT. After payment of a judgment to the plaintiff's authorized agent, a sale on execution thereunder is void, and the lack of jurisdiction to sell is not cured by an order confirming the sale.

QUIETING TITLE—EJECTMENT—PLEADING—DEFENSES. Under Rem. & Bal. Code, § 785, providing that, in actions to recover the possession of land, the parties shall set forth their title, and that the superior title, whether legal or equitable, shall prevail, the court is to determine the title and grant relief according to the equities of the case; and defendants in possession, claiming that plaintiffs' execution sale was void on the ground that the judgment had been paid, need not first institute a direct proceeding to cancel the judgment before answering the complaint.

ESTOPPEL—TO QUESTION EXECUTION SALE. It cannot be urged that judgment debtors are estopped from claiming the invalidity of an execution sale by standing by while title was passing to innocent purchasers, where, under instructions not excepted to, and sufficient evidence, the jury found they were not innocent purchasers.

Appeal from a judgment of the superior court for King county, Irwin, J., entered October 23, 1909, upon the verdict of a jury rendered in favor of the defendants, in an action to recover possession and quiet title to land. Affirmed.

Karr & Gregory, for appellants.

Brady & Rummens and *W. H. B. Thomas*, for respondents.

DUNBAR, J.—This is an action by the appellants to dispossess the respondents James Ball and Sarah Ball, his wife, of lots 28 and 29, block 167, Gilman's addition to the city of Seattle, King county, Washington. The facts upon

[1]Reported in 109 Pac. 209.

which the action is based, in brief, are as follows: On February 11, 1907, James G. Combs, who had been an attorney, for the respondents, brought an action against said respondents for attorney's fees, and recovered a judgment in the sum of $95.60. On February 15, 1907, Combs filed a transcript of said judgment in the superior court of King county, Washington, and on March 5, 1907, execution on said judgment was issued and levied by the sheriff of King county, and on April 13, 1907, the sheriff sold the property to satisfy the said judgment, Combs being the purchaser at the execution sale, for the sum of $109.78. The return of the sale was made, and the same was confirmed April 27, 1907. On April 16, 1908, the sheriff executed his deed to said lots to the said James G. Combs to satisfy said judgment. Said deed was duly entered in the proper records. In the month of May, 1908, Combs and wife executed a quitclaim deed to said land to Alexander McLiesh, one of the appellants herein. The purchase price was $1,000, $200 being paid in cash and a mortgage given for the balance in the sum of $800.

Before the sale of the land, it appears from the evidence that Combs had notified Ball that sale would be made if the judgment was not satisfied. Prior to the sale, however, and shortly after the judgment was obtained, according to the testimony of Ball and his witness, he had a communication from Combs, the judgment creditor, and Combs instructed him to pay the money for the satisfaction of the judgment to one Cummings, an attorney in Seattle, and that he would be responsible for the payment of the money to him by Cummings. This transaction is denied by Combs. It is claimed that the money was paid in accordance with Combs' instructions to Cummings, and that there were some delays on the part of Cummings in turning the money over to Combs, for a few days; that in the meantime Combs had incurred some expense in the way of having a transcript of the judgment properly entered in the superior court, and that he refused

to accept said money until such extra expenses, amounting to a few dollars, had been paid; that Cummings refused to pay said extra expenses, and that Combs then proceeded with the sale of the land. The answer also alleged fraud on the part of Combs and the appellants herein in the transfer of the title to the lots in question; denied that the appellant was an innocent purchaser; and upon these issues the cause went to trial, the jury finding in favor of the defendants. The court entered a judgment canceling the deeds upon which plaintiffs relied, and quieting defendants' title. From this judgment, this appeal is taken.

The assignments are that the court erred, (1) in permitting the judgment to be attacked collaterally in this proceeding; (2) in refusing to give an instructed verdict for the plaintiffs; and (3) in allowing certain evidence to be admitted, which it is claimed is prejudicial to the jury in rendering a fair and impartial verdict. As to the first assignment, we do not think the cases cited by appellants reach the particular case under consideration. There is no attempt here to question the regularity of any of the proceedings leading up to the judgment, or to question or attack the judgment itself. The contentions which are vital to the case are over matters arising subsequently to the rendition of the judgment, viz., that the judgment has been paid; and if that contention be true, the judgment thereafter, under all authority, ceased to be operative, and it follows that no sales based upon it could confer title. Nor was this lack of jurisdiction to sell cured by the confirmation of sale. A sale on a void judgment is not one of the irregularities contemplated by the statute. In *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264, it was held that a mortgage foreclosure sale of land, situated in a county other than the one in which the sale was had, was not cured by confirmation, the court saying:

"Under the express provision of our statute and numerous decisions of this court, irregularities in the manner of conducting sales are the only defects cured by confirmation. We

hold, therefore, that the sale was utterly void in its inception, and remains so notwithstanding the direction in the decree of foreclosure and the order of confirmation."

As to the form of the action, while denominated by the appellants an action in ejectment, it is in reality an action brought under § 785 *et seq.*, Rem. & Bal. Code. Section 785 provides that, any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, and § 793 provides that the plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. In this case the plaintiffs brought their action in the superior court, and, in accordance with the direction of the statute, set forth that they were owners of, and entitled to the possession of, the land, and the defendants' answer denied the allegations of ownership and alleged ownership in them. The case was then ready for trial on the issues made by the pleadings. The question for determination under the express terms of the statute was, who had the superior title, whether legal or equitable. It would be out of harmony with the spirit of the code and the decisions of this court to compel the defendants to first institute a direct proceeding to cancel the judgment before they would be allowed to answer the plaintiffs' complaint. This is the construction placed upon this statute in *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, though the decision in that case was hampered by the previous decision of this court in *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, which case, however, has since been overruled in *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483, where the broad rule was announced that, no matter what the form of action might be, the court would give the relief which the facts stated and proved showed the party entitled to.

On the merits of the case, the verdict of the jury leaves

little to be said. The jury found by general verdict that the plaintiffs were not entitled to the possession of the property described in the complaint, and by special verdict as follows:

"We, the jury in the above entitled cause, do find that James G. Combs did appoint John B. Cummings as agent for the purpose of collecting a judgment in favor of Combs in the action of Ball v. Combs and wife in Justice Carroll's court."

It is proven conclusively, and is not disputed, that the money was paid by Ball to Cummings for the purpose of satisfying the judgment, and under the finding that Combs had appointed Cummings his agent for the purpose of collecting the judgment, which finding we think was based upon substantial testimony, the defendants' case was successfully proven.

It is earnestly contended by the appellants that the respondents should be estopped from claiming the invalidity of the sale, after having stood by with the knowledge that the title was passing to an innocent purchaser. Under the instructions of the court, which are not assigned as error, the jury must have come to the conclusion that the appellants were not innocent purchasers, and without reviewing the testimony specifically, we think there is sufficient to warrant such conclusion.

No error appearing in the trial of the cause, the judgment is affirmed.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 8279. Department Two. March 28, 1910.]

MARTHA A. MILLER, *Respondent*, v. V. D. MADDOCKS *et al.*, *Appellants*.[1]

Appeal from a judgment of the superior court for King county, Morris, J., entered January 16, 1909. Affirmed.

H. D. Moore and *John P. Hartman*, for appellants.

Herr, Bayley & Wilson, for respondent.

PER CURIAM.—The issues and assignments of error in this consolidated cause being in principle the same as those involved in *Shorett v. Signor*, *ante* p. 89, 107 Pac. 1033, the parties to this appeal have stipulated that the disposition of this case shall be controlled by that. The judgment herein is therefore affirmed.

[No. 8596. Department One. March 30, 1910.]

ALEX BILLS *et al.*, *Appellants*, v. W. C. REEDER, *Respondent*.[2]

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered November 15, 1909. Appeal dismissed.

A. B. Wiltse, for appellants.

Miller & Lewis, for respondent.

PER CURIAM.—This is an appeal from an order sustaining a demurrer to a complaint. Such an order is not final or appealable. *Zellar v. Siemens*, *ante* p. 116, 107 Pac. 1054, and cases cited. Appeal dismissed.

[1]Reported in 107 Pac. 1036.

[2]Reported in 107 Pac. 1055.

[No. 8683. Department One. March 30, 1910.]

COMMERCIAL & SAVINGS BANK OF RACINE, WISCONSIN, *Respondent*, v. I. N. WAMOCH, *Appellant*.[1]

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered September 29, 1909. Appeal dismissed.

Lovell & Davis, for appellant.

James Freece and *Samuel P. Weaver*, for respondent.

PER CURIAM.—A demurrer interposed to the complaint in this action was sustained. Thereafter the court granted a rehearing and entered an order overruling the demurrer. From this latter order, the defendant has appealed. But no final judgment has been entered in the cause, and under repeated rulings of this court such orders as this are not appealable. *Zellar v. Siemens*, *ante* p. 116, 107 Pac. 1054, and cases there cited. The appeal is therefore dismissed.

[No. 8461. Department Two. May 2, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. N. R. SYLVESTER, *Appellant*.[2]

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered May 27, 1909. Affirmed.

Henry J. Snively and *H. B. Noland*, for appellant.

A. A. Hinman, for respondent.

PER CURIAM.—The questions involved in this case are the same as in the case of *State v. Smith*, *ante* p. 235, 108 Pac. 618. The judgment is affirmed.

[1]Reported in 107 Pac. 1055

[2]Reported in 108 Pac. 620.

[No. 8149. *En Banc.* May 11, 1910.]

HENRY LOHMAN, *as Administrator etc., Appellant,* v. HENRY CLAUSSEN, *Receiver etc., Respondent.*[1]

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 9, 1908, allowing compensation to a receiver appointed pending the foreclosure of a mortgage, after a trial on the merits before the court. Affirmed.

Lueders & Phelps, for appellant.
Ray & Dennis, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—Learned counsel for appellant in his petition for rehearing *en banc* in this case, proceeds upon the theory that the judgment appealed from and affirmed by our decision of October 29, 1909 (*Lohman v. Claussen*, 55 Wash. 408, 104 Pac. 624), was a personal judgment against Henry Lohman, and that we have overlooked this fact. In our former decision it was stated that the judgment appealed from was rendered against appellant *as administrator*. In order that there may be no doubt remaining upon this question, we quote from the language of the judgment as shown by the record before us, which is: "That judgment issue against Henry Lohman, as administrator of the estate of Mary A. Lohman, deceased, in the sum of Five Hundred dollars in favor of Henry Claussen, Receiver."

Learned counsel's argument is, in substance, that since Henry Lohman individually was not a party to the action, therefore, judgment for the receiver's compensation could not be thus rendered against him in the action; but since the record plainly shows that the judgment was rendered against him in the same representative capacity in which he appeared as plaintiff in the action, it is plain that the record furnishes no basis for counsel's argument.

Rehearing is therefore denied.

[No. 8739. Department Two. May 18, 1910.]

G. W. SAMPSON, *Appellant*, v. THE CITY OF SEATTLE, *Respondent.*[2]

Appeal from a judgment of the superior court for King county, Main, J., entered July 8, 1909. Affirmed.

Chas. M. Fouts and *Kitt Gould*, for appellant.
Scott Calhoun and *Bruce C. Shorts*, for respondent.

PER CURIAM.—This appeal presents the identical questions decided by this court in *Fisher v. Seattle*, 55 Wash. 396, 104 Pac. 655, and for the reasons there stated, the judgment is affirmed.

[1]Reported in 108 Pac. 766.
[2]Reported in 108 Pac. 1135.

[No. 8830. Department Two. May 26, 1910.]

MAGGIE MORGAN, *Appellant*, v. THOMAS MORGAN, *Respondent*.[1]

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 28, 1910, dismissing an action to vacate a deed for fraud. Affirmed.

Bridges & Bruener, for appellant.

W. H. Abel, for respondent.

MOUNT, J.—This action was brought by the appellant against the respondent to set aside a deed to certain real estate in the city of Aberdeen. The complaint alleged that the deed was executed and delivered by the appellant to respondent without knowledge of the execution or delivery thereof, and that it was procured by fraud and without any consideration. These allegations were denied by the respondent, and the case was tried upon these issues to the court without a jury. At the conclusion of the evidence of both plaintiff and defendant, the trial court dismissed the action, and the plaintiff has appealed.

The case presents only questions of fact. We have carefully examined the evidence taken at the trial and, while that of the plaintiff is sufficient to sustain the allegations of her complaint, if believed by the court, the evidence of respondent, if true, and circumstances in the case, are sufficient to overcome the plaintiff's case and to show that respondent obtained the deed honestly and for a valuable consideration. We do not feel justified therefore in setting aside the decree upon the evidence before us.

The judgment appealed from must be affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[1]Reported in 108 Pac. 1071.

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1. AGRICULTURE — FAIRS — PUBLIC AID—COUNTIES—APPROPRIATIONS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 3024 *et seq.*, which provides that any fair association which has a corporate existence for the purpose of holding fairs may apply to the county commissioners for aid, that the commissioners shall be *ex officio* members of the county fair association, and that all buildings and structures shall belong to the county making the appropriation, and that vouchers for all expenditures of money appropriated shall be made to the county commissioners, a county has no power to appropriate money in aid of the Southwest Washington Fair Association, a state institution (created by virtue of Rem. & Bal. Code, § 3012 *et seq.*) managed by commissioners appointed by the governor and empowered to acquire land for holding fairs under a state appropriation therefor; since the act authorizing county aid to fairs is to be strictly construed, and requires the management and title to be vested in the county, without any indication of legislative intent to authorize county appropriations in aid of a state institution; especially as the act in which such authority is sought antedates the act creating the state institution. *Moses v. Summersett*..... 403

ALIENS:

Disposal and acquisition of property, see TREATIES.

ALTERATION OF INSTRUMENTS:

1. ALTERATION OF INSTRUMENTS—MATERIALITY. Memoranda or notations upon a promissory note which did not change the date, sum payable, time of payment, parties, medium or place of payment, and which did not alter the note in any respect, do not constitute a material alteration avoiding payment. *Pitt v. Little*..... 355

AMENDMENT:

On appeal or writ of error, see APPEAL AND ERROR, 26.

Of decree of divorce, see DIVORCE, 2.

Mechanic's lien claim, see MECHANICS' LIENS.

Of municipal charter creating municipal plans commission, see MUNICIPAL CORPORATIONS, 1-3.

On appeal of application to purchase shore lands, see PUBLIC LANDS, 3.

ANIMALS:

Carriage of live stock, see CARRIERS, 1-4.

APPEAL AND ERROR:

Review of orders not appealable, see CERTIORARI.
Costs, see COSTS, 3-6.
Criminal appeals, see CRIMINAL LAW, 4, 8, 9.
Condemnation proceedings, see EMINENT DOMAIN, 15.
Commencement of new suit after reversal of judgment, see LIMITATION OF ACTIONS.
Amendment of application to purchase shore lands, see PUBLIC LANDS, 3.

III. DECISIONS REVIEWABLE.

1. APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS. An order sustaining a demurrer to a petition to vacate a judgment is not final or appealable, no further disposition of the case having been made. *Zellar v. Siemens*..... 116

2. APPEAL—DECISIONS REVIEWABLE—VACATION OF DEFAULT—FINALITY. An order quashing the service of summons and vacating a default judgment, leaving the case pending for further proceedings, is not appealable, as it can be reviewed on appeal from the final judgment. *Wilson v. McGillivray*..... 291

3. SAME—FINALITY OF ORDER. Where the record shows that defendant is out of the state and cannot be served, an order quashing service of summons and opening a default does not in effect determine the action and prevent final judgment, where it does not appear that substituted service by publication and attachment could have been had; since finality of the order must appear on the face of the record. *Wilson v. McGillivray*..... 291

4. APPEAL—DECISIONS REVIEWABLE—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a decree of specific performance requiring the payment of a certain sum within 120 days, without any supersedeas bond being given, will not be dismissed after the expiration of the 120 days because of cessation of the controversy, where the appellant claims that the decree required the payment of an excessive sum; since if reversed, the appellant would be entitled to a reasonable time within which to pay the proper sum. *Whipple v. Lee* 253

5. APPEAL AND ERROR—DECISIONS REVIEWABLE—DENIAL OF TEMPORARY INJUNCTION—INSOLVENCY. Under Rem. & Bal. Code, § 1716, subd. 3, an appeal does not lie from an order denying a temporary injunction unless the party against whom the temporary injunction was sought was found to be insolvent. *Morrison v. Bernot*..... 302

6. SAME—DECISIONS REVIEWABLE—ORDER OVERRULING DEMURRER. An order overruling a demurrer is not appealable. *Morrison v. Bernot* 302

APPEAL AND ERROR—CONTINUED.

IV. RIGHT TO APPEAL.

7. APPEAL—RIGHT TO APPEAL—PROCEEDINGS—CONSOLIDATED ACTIONS. A single appeal from one judgment entered in actions consolidated for trial may be taken by appellants jointly affected by the judgment. *O'Connor v. Force*..... 215

8. APPEAL—REVIEW—PARTIES ENTITLED. Railroad contractors, upon appeal from a judgment against them in favor of a sub-contractor, cannot urge error in the granting of a nonsuit as to the railroad company, joined with them as defendants in the action. *Evans v. Oregon & Washington R. Co*..... 429

9. APPEAL AND ERROR—RIGHT TO APPEAL—WAIVER—ESTOPPEL—PROSECUTING ANOTHER ACTION. Error in dismissing defendant's counterclaim is waived by his prosecution of another action for the same claim, and estops him from prosecuting an appeal from the judgment dismissing the first action. *Morrison v. Bernot*..... 302

V. PRESENTATION AND RESERVATION IN LOWER COURT.

10. APPEAL — REVIEW — INSTRUCTIONS—REQUESTS. Error cannot be based upon the refusal to give certain instructions where no request therefor was made. *State v. Peacock*..... 41

11. APPEAL—PRESERVATION OF GROUNDS—ESTOPPEL. Where appellants requested an instruction that a preponderance of the evidence was sufficient, they cannot complain of the failure of the court to instruct that it requires clear, positive, and satisfactory evidence to establish a rescission of a written contract. *Evans v. Oregon & Washington R. Co*..... 429

12. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error in instructions cannot be urged where no exceptions appear in the record. *Ankeny v. Young Bros*..... 634

13. APPEAL—REVIEW—FINDINGS—MOTION FOR NEW TRIAL—NECESSITY. In the absence of the evidence or exceptions, the findings are conclusive, and the appellant being satisfied therewith, waives no rights by failing to move for a new trial, but is entitled to a proper judgment on the findings. *Peterson v. Lone Lake Lumber Co*..... 72

X. RECORD.

14. APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts, error depending upon the evidence cannot be assigned. *Pack v. Peabody*..... 76

15. APPEAL—REVIEW—FINDINGS. Findings of fact cannot be reviewed in the absence of the evidence. *Pack v. Peabody*..... 76

16. APPEAL AND ERROR—RECORD—NECESSITY—MOTIONS—CERTIORARI. An application for a writ of certiorari and a motion to advance the hearing of an appeal will not be considered until the record on appeal has been made up and filed in the supreme court. *Kennedy Drug Co. v. Keyes Drug Co*..... 499

APPEAL AND ERROR—CONTINUED.

17. APPEAL—RECORD—INSTRUCTIONS. Error cannot be predicated on the refusal to give requested instructions when the instructions given are not brought up in the record. *State v. Newcomb*.... 414

18. APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS AND EXHIBITS. Unless incorporated in a bill of exceptions or statement of facts, affidavits and exhibits cannot be certified to the supreme court by the trial judge or considered on appeal. *Kennedy Drug Co. v. Keyes Drug Co*..... 499

XI. BRIEFS.

19. APPEAL—BRIEFS—PRINTING FINDINGS. An appeal will not be dismissed for failure to print all the findings of fact and conclusions of law in the brief, where appellant has sufficiently complied with the rule of court in respect thereto. *Peterson v. Lone Lake Lumber Co.* 72

XVI. REVIEW.

20. APPEAL—REVIEW. Questions not passed upon by the trial court are not reviewable on appeal. *Morrison v. Bernot*..... 302

21. APPEAL—REVIEW—TRIAL—FINDINGS. Upon appeal the supreme court will not recast conflicting and confusing findings of the trial court, in order to harmonize them. *Turner v. Creech*..... 439

22. APPEAL—REVIEW—VERDICT. A special finding of the jury contrary to undisputed evidence and unsupported by any testimony must be disregarded. *Muelhman v. Spokane & Inland Empire R. Co*..... 327

23. APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be set aside when supported by sufficient direct and circumstantial evidence. *Evans v. Oregon & Washington R. Co*..... 429

24. APPEAL—REVIEW—VERDICT. The verdict of a jury will not be overruled because of conflict in the evidence. *Tacoma v. Bonnell* 593

25. APPEAL—REVIEW—VERDICT. Upon a direct conflict in the evidence of two witnesses, the question becomes one of fact for the jury, and its verdict cannot be set aside on appeal. *Ankeny v. Young Bros.* 634

26. APPEAL—REVIEW—AMENDMENTS—CONTINUANCE—HARMLESS ERROR. Error in permitting a trial amendment to the complaint cannot be urged where no surprise was shown or continuance asked. *Pack v. Peabody* 76

27. APPEAL—REVIEW—HARMLESS ERROR—RELEASE—PLEADING—EVIDENCE. It is not prejudicial error, in an action for personal injuries, to admit evidence of a release of damages not pleaded in the answer, where the release was first properly admitted on cross-examination of the appellant affecting his credibility, and explained by him without any claim of fraud or duress, on redirect examination. *Tindall v. Northern Pac. R. Co*..... 118

APPEAL AND ERROR—CONTINUED.

28. APPEAL—REVIEW—HARMLESS ERROR. On trial *de novo* after a trial before the court without a jury, error in admitting incompetent evidence is immaterial where the findings are sustained by competent evidence. *Eichbaum v. Caldwell Brothers Co*..... 163

29. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. It is harmless error to refuse to admit evidence where, regardless of the evidence offered, there was not sufficient testimony to support a finding for the appellant. *Shaw v. Lobe*..... 219

30. APPEAL—REVIEW—HARMLESS ERROR—TRIAL—MISCONDUCT OF COUNSEL. In an action for wrongful death, the remark of plaintiff's counsel in his closing argument to the jury, that the only defense is the time-worn plea of contributory negligence which is always put forth in such cases, while unfair and not based upon the evidence, is not such a misstatement as to mislead the jury and require a new trial, especially where the court instructed that it was the duty of the jury to follow the rules of law laid down by the court. *Buckles v. Reynolds* 485

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

31. APPEAL AND ERROR—DECISION—REMAND—NEW TRIAL. Where, after a verdict for the plaintiffs, defendant moved for a new trial and also for a judgment notwithstanding the verdict, and the latter motion was erroneously granted, the supreme court, on reversing the case, will remand it with directions to give the defendant the benefit of his motion for a new trial, since he is entitled to have the same acted upon. *O'Connor v. Force*..... 215

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.

APPLICATION:

For insurance, see INSURANCE, 1-10.

APPRAISEMENT:

Effect of waiver of appraisement of property, see EXEMPTIONS, 3.

APPROPRIATION:

By county for state fair association, see AGRICULTURE.
Of water rights, see WATERS AND WATER COURSES, 1.

ARBITRATION AND AWARD:

Reference of issues under order of court, see REFERENCE.

ARCHITECTS:

Certificate as evidence of damage on default of contractor, see PRINCIPAL AND SURETY, 8.

ARGUMENT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 3.

ASSAULT AND BATTERY:

Ejection of passenger, see CARRIERS, 5-10.
Damages for assault, see DAMAGES, 1, 2.

1. ASSAULT AND BATTERY—CIVIL ACTION—DEFINITION—INSTRUCTIONS. An assault is sufficiently defined by an instruction to the effect that it may be found where one shook his fist in the face of another in such proximity that he could have struck such person, or near enough to produce a feeling on the part of such other person that he might be struck; the presence or absence of an assault depending more upon the apprehension created than the undisclosed intent. *Howell v. Winters* 436

2. SAME—JUSTIFICATION—INSTRUCTIONS. In an action for an assault committed in defendant's store, the right of the defendant to remove the plaintiff from the store is sufficiently stated in an instruction to the effect that defendant had a right to request the plaintiff to leave, and to use sufficient force to eject her, but that her refusal to leave would not justify an assault; especially where the assault was not committed in removing the plaintiff. *Howell v. Winters*..... 436

ASSENT:

See ACCOUNT STATED.

ASSESSMENT:

To pay cost of constructing canal, see CANALS.
Of compensation for property taken for public use, see EMINENT DOMAIN.
For public improvements, see MUNICIPAL CORPORATIONS, 5, 9-11.

ASSIGNMENT:

Of cause as champertous transaction, see CHAMPERTY AND MAINTENANCE.
Of contract for sale of land, see VENDOR AND PURCHASER, 5.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 8.

ATTACHMENT:

Property exempt from attachment and protection of rights of exemption, see EXEMPTIONS.

1. ATTACHMENT—GROUNDS—DISSOLUTION—EVIDENCE—SUFFICIENCY. It is not an abuse of discretion to refuse to dissolve an attachment sought on the ground that defendant was guilty of a fraud in entering into a contract whereby he was to finish a house, and that defendant was about to dispose of his property, where the evidence tended to show that materials not used were charged against the owner, that he misappropriated funds supplied to pay labor claims, and was attempting to dispose of his property, and it appears that the attached property might have been squandered and dissipated. *Gordon v. Gillespie* 627

ATTORNEY AND CLIENT:

Misconduct of counsel in argument as harmless error, see APPEAL AND ERROR, 30.

Argument and conduct of counsel at trial in criminal prosecution, see CRIMINAL LAW, 3.

Fees in suit for divorce, see DIVORCE, 1-3.

Allowance of attorney's fees to administrator, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Recovery of fees allowed in lien foreclosures, see INDEMNITY, 3.

Misconduct of counsel ground for new trial, see NEW TRIAL, 1.

Attorney's fees in contesting probate of will, see WILLS, 3, 4.

AUDITING:

Claims in action on bond, see INDEMNITY, 12.

AUTHORITY:

Of county commissioners to employ bailiffs or clerks for justices of the peace, see COUNTIES.

Of municipal plans commission to approve vouchers, see MUNICIPAL CORPORATIONS, 2.

Of agent, see PRINCIPAL AND AGENT.

BAILMENT:

Carriage of goods, see CARRIERS, 11-18.

1. BAILMENT—USE—COMPENSATION—EVIDENCE—SUFFICIENCY. In an action to recover for the use of a young mare for about four years, the evidence is insufficient to support a verdict for $1,046.50 where the value of the animal or her use was not shown, and the parties were brothers, neither engaged in a business indicating that other than ordinary use was contemplated; and $400 appears to be all that she could have earned. *Van de Vanter v. Redelsheimer*..... 38

BANKS AND BANKING:

1. BANKS AND BANKING—RECOVERY OF DEPOSIT—EVIDENCE—FORGERY—OTHER SIMILAR ACTS. Upon an issue as to the forgery of a check paid by a bank, in an action by the customer to recover the deposit, it is error to permit a third person to testify that the bank had refused payment of another check purporting to be drawn by plaintiff in favor of the same payee which was also repudiated as a forgery. *Buell v. Aberdeen State Bank*..... 407

2. SAME. Upon such an issue, it is error to receive evidence that plaintiff had caused a warrant to issue for the arrest of the payee on the charge of forgery; also, to show that the defendant's officers refused to contribute to a sum to be offered as a reward for his arrest. *Buell v. Aberdeen State Bank*..... 407

3. SAME. Upon such an issue, it is error to admit evidence that the payee of the check had years before gone under an alias in Alaska, and could closely imitate the signature of the witness. *Buell v. Aberdeen State Bank*..... 407

BAR:

By former action, see INDEMNITY, 7.
Of action by former adjudication, see JUDGMENT, 4, 5.
Laches in vacation of tax deed, see TAXATION, 6.

BARRATRY:

See CHAMPERTY AND MAINTENANCE.

BATTERY:

See ASSAULT AND BATTERY.

BENEFITS:

As affecting compensation for appropriation of property, see EMINENT DOMAIN, 4.

BETTING:

See GAMING.

BILLS AND NOTES:

Materiality of alteration of note, see ALTERATION OF INSTRUMENTS, 1.
Presumptions as to laws of other country, see EVIDENCE, 2.
Authority of agent to take notes in payment for property sold, see PRINCIPAL AND AGENT, 2.

1. BILLS AND NOTES—CONSIDERATION. The debt of a corporation and an extension of time for payment is sufficient consideration for the execution of the personal note of the president of the corporation. *Pitt v. Little* 355

2. BILLS AND NOTES—DEFENSES—COLLATERAL AGREEMENT—EVIDENCE—TO VARY WRITING. The maker of a promissory note upon sufficient consideration cannot, in the absence of fraud or mistake, set up any collateral agreement exempting him from liability. *Pitt v. Little* 355

3. BILLS AND NOTES—RELEASE—BY PAROL—"RENUNCIATION." Under Rem. & Bal. Code, § 3512, requiring the "renunciation" of rights against the maker of a promissory note to be in writing unless the note is delivered up, the maker cannot show an oral agreement to release him from liability when the note was not surrendered, as "renunciation" is used in the statute in the sense of "release." *Pitt v. Little* 355

4. BILLS AND NOTES—ACTION BY INDORSEE—DEFENSES—FRAUD—BURDEN OF PROOF. In an action by an indorsee upon a promissory note given for the purchase price of a horse, defended on the ground of fraud and breach of warranty, in which plaintiff relied upon a prima facie case without proof of the manner of acquiring the note, sufficient evidence that the payee procured the note and a waiver of the warranty by fraud shifts the burden to the plaintiff to establish that it is a holder in due course. *City National Bank v. Mason* 492

BONA FIDE PURCHASER:

See HUSBAND AND WIFE, 2, 3.
Preference right to purchase shore lands, see PUBLIC LANDS.
Enforcement of contract as against, see SPECIFIC PERFORMANCE, 1.
Of lands, see VENDOR AND PURCHASER, 7, 8.

BONDS:

Costs allowed for surety bond on appeal, see COSTS, 6.
Of indemnity, see INDEMNITY.
Sureties on bonds, see PRINCIPAL AND SURETY.
Security for costs in contest of probate of will, see WILLS, 2.

BOOKS:

Inspection of corporate books and records by stockholders, see CORPORATIONS, 5, 6.

BOOMS:

See NAVIGABLE WATERS, 2.

BOUNDARIES:

Mistake and possession to boundaries as adverse, see ADVERSE POSSESSION.

1. BOUNDARIES—CONFLICTING CALLS—SHORTAGE—QUANTITY—LOCATION. Where the owner of the northern portion of lots supposed to be 130 feet long, but the north line of which projected into the street, conveyed a strip 6 2-3 feet wide to the owner of the south 43 1-3 feet of the lots, the description starting from a point 80 feet south of the northwest corner, and the strip was surveyed and marked upon the ground and the vendee took possession and made improvements, ejectment cannot be maintained by the grantor or his subsequent grantee to recover part of the strip conveyed upon ascertaining that the lots were only 128.2 feet long, although it was the intention by the conveyance to reserve 80 feet in the northern tract. *Turner v. Creech* 439

2. SAME—ACTS OF COMMON GRANTOR. The location of a boundary line by a common grantor is binding upon the grantees. *Turner v. Creech* 439

3. SAME—QUANTITY—BEGINNING POINT. Where a quantity is of the essence of the contract, it controls courses in the description, the beginning point of which is of no higher dignity than other calls. *Turner v. Creech* 439

4. SAME—LOCATION—POSSESSION—ACQUIESCENCE. Practical or agreed location of boundaries, acquiesced in or acted upon by the placing of improvements, controls the calls of a deed. *Turner v. Creech*. 439

BREACH:

Of contract for brokers' commissions, see BROKERS.
Of contract, see CONTRACTS.
Of building contracts, see INDEMNITY; PRINCIPAL AND SURETY.
Of warranty in application for insurance, see INSURANCE, 4-10.
Of contract of sale, see SALES.

BRIEFS:

On appeal or writ of error, see APPEAL AND ERROR, 19.
Costs on affirmance after failure to file brief, see COSTS, 4.
Costs on appeal for printing briefs, see COSTS, 5.

BROKERS:

Damages on breach of contract for commissions, see DAMAGES, 3.
Liability of community property for wrongful act of agent, see HUSBAND AND WIFE, 4.

1. BROKERS — CONTRACTS — STIPULATIONS — CONSTRUCTION — WAIVER. Where a broker's contract provided for the sale of bonds on commission within a specified time after receiving written notice of the deposit of the bonds, notice in writing is for the protection of all the parties, and is waived where the authorized agent of the principals notified the brokers that the bonds were ready for sale and delivery and that the notice would be waived, and the brokers relied and acted thereon. *Church v. Wilkeson-Tripp Co*..... 262

2. BROKERS—CONTRACTS—ACTION FOR BREACH—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY. In an action by brokers for damages for breach of a contract to sell bonds on commission, breach of the contract having resulted from the admitted failure of the defendants to perfect their title to the property, it is error likely to prejudice the jury to admit in evidence escrow deeds showing the consideration that was to have been paid, the deeds not having been delivered and there being no issue in regard to the title or failure of title. *Church v. Wilkeson-Tripp Co.* 262

3. BROKERS—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES — EXPENSES INCURRED. Where a broker's contract for the sale of bonds on commission required the brokers to pay all expenses and outlay for advertising, etc., and on breach of the contract, the brokers sued to recover all the commissions that they might have earned, they are not entitled to reimbursement for expenses incurred, although pleaded, and evidence thereof should be excluded. *Church v. Wilkeson-Tripp Co*..... 262

4. BROKERS—CONTRACT—BREACH—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY. The evidence is sufficient to entitle brokers to recover damages for breach of a contract, and a nonsuit is properly denied, where it appears that they were employed by the defendants, promoters of a mining corporation, to sell bonds and stock on commission, that the defendants refused, on demand, to perfect their title to the property or to deliver the bonds, and that the plaintiffs then

BROKERS—CONTINUED.

gave notice that they would rescind the contract and hold the promoters for their commissions as damages sustained. *Church v. Wilkeson-Tripp Co.* 262

5. BROKERS—CONTRACTS—BREACH—DAMAGES—CONTEMPLATED PROFITS—EVIDENCE—SUFFICIENCY — EXCESSIVE VERDICT. In an action by brokers to recover damages for breach of a contract to sell an issue of $300,000 in bonds of a mining company, within a specified time, the evidence is insufficient to show that they could have sold all the bonds and earned the entire commissions, where plaintiffs merely proved probable sales to the amount of $25,250, and it appeared that the $300,000 was secured on coal lands recently purchased for the sum of $65,000; and a verdict for the entire commissions is based on conjecture and speculation, and should be reduced to the amount of the commissions on the probable sales shown. *Church v. Wilkeson-Tripp Co.* 262

BUILDINGS:

Building contracts, see CONTRACTS, 3, 5.
Damages for injury or removal, see EMINENT DOMAIN, 5-7.
Contractor's indemnity bonds, see INDEMNITY.
Contracts of suretyship, see PRINCIPAL AND SURETY.

BURDEN OF PROOF:

To show holder in due course, see BILLS AND NOTES, 4.
To justify or reduce crime to lower degree, see HOMICIDE, 3.
In action on insurance policy, see INSURANCE, 6.
To show duties as part of interstate commerce, see MASTER AND SERVANT, 6.

CALLS:

In deeds, see BOUNDARIES.

CANALS:

1. CANALS—ESTABLISHMENT—SPECIAL ASSESSMENTS—STATUTES—CONSTRUCTION—INTENT OF FEDERAL GOVERNMENT. The resolutions and acts of Congress appropriating money to pay the cost of making investigations and preliminary surveys for the construction of the "Lake Washington Canal", upon the state's securing a right of way therefor for the benefit of the United States (which was done), with the proviso that nothing therein contained shall be construed as an adoption of the project, did not manifest any intention on the part of the United States to construct or operate the canal within a reasonable time, or at all, within the meaning of Rem. & Bal. Code, § 8148, authorizing local assessments by the county commissioners upon the property specially benefited for the purpose of paying the cost, in whole or in part, of constructing the Lake Washington Canal, "whenever the government of the United States is intending or proposing the construction or operation" of such canal. *State ex rel. Burke v. Board of Commissioners* 511

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see CONTRACTS, 4.
Removal of clouds from title, see QUIETING TITLE.
Rescission of contract of sale of land, see VENDOR AND PURCHASER, 4.

1. CANCELLATION OF INSTRUMENTS—DEEDS—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY. There is sufficient evidence of fraud entitling the grantor to a cancellation of his deed, where it appears that he was induced to make a trade of his property for 32 lots represented to be in a city center and worth one hundred dollars a lot, when they were seven miles from the business center and not worth over a dollar a lot, that the deed was not to be delivered until he had received $2,000 on a sale of twenty of the lots to a pretended purchaser, who paid $50 without any intention of completing the purchase, and that delivery of the deed was wrongfully secured by the agent, who acted for both parties in the trade and was guilty of the frauds practiced. *Hoerling v. Lowry* 426

CAPACITY:

Of grantor to execute deed, see DEEDS, 1.

CARRIERS:

Requiring construction and operation of spur track as taking of property without due process, see CONSTITUTIONAL LAW, 4.
Master's liability for injuries to servant, see MASTER AND SERVANT, 2, 5, 6.

1. CARRIERS—OF LIVE STOCK—CONTRACTS—EXEMPTION FROM LIABILITY—PUBLIC POLICY. A statute providing that a railway carrier of live stock cannot exempt itself from liability for losses or injuries caused by its own negligence is a rule of public policy in this state. *Carstens Packing Co. v. Southern Pac. Co.* 239

2. SAME—CONTRACTS—VALIDITY—WHAT LAW GOVERNS. An exemption by contract from liability for negligence by a railroad transporting live stock into this state, contrary to the provisions of Rem. & Bal. Code, § 8648, is void as against public policy, although valid under the laws of the state where the contract was made; and comity does not require its enforcement in this state. *Carstens Packing Co. v. Southern Pac. Co.* 239

3. SAME—CLAIMS FOR LOSS—EVIDENCE—ADMISSIBILITY. In an action for injuries to live stock transported by defendant under a contract requiring claims for loss sustained to be made in writing within ten days after unloading the stock, evidence of abnormal shrinkage in weight is admissible without a bill of particulars or specification of the item, where the claim was for loss and damage due to rough handling, bruises, and depreciation in value, and opportunity was given to inspect the stock on arrival at its destination. *Carstens Packing Co. v. Southern Pac. Co.* 239

CARRIERS—CONTINUED.

4. SAME—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. The evidence is sufficient to sustain a verdict for loss and damage to cattle transported, through negligent rough handling of the train by the carrier, although the testimony of the shipper's representative accompanying the stock could not be obtained, where there was evidence tending to show the condition of the cattle when shipped, and when delivered, and that a great number were so seriously bruised as to be unsalable. *Carstens Packing Co. v. Southern Pac. Co*..... 239

5. CARRIERS—STREET CARS—RULES—REASONABLENESS—DISOBEDIENCE—EFFECT. The rule forbidding passengers to ride upon the front platform of a street car is reasonable, and a passenger who on notice refuses to obey the rule, until the car is run into the car barn and other passengers are transferred to another car, forfeits his right as a passenger and is not entitled to a transfer or to ride on the second car without paying another fare. *Kirk v. Seattle Electric Co.* 283

6. CARRIERS — OF PASSENGERS — WRONGFUL EJECTION — ASSAULT — ACTIONS—PLEADING—SEVERAL CAUSES. In an action by a passenger for wrongful ejection from a street car, a demurrer to the complaint on the ground that several causes of action are improperly united is properly overruled where but one cause of action is pleaded—that for assault, although it is also alleged that plaintiff was arrested after the assault. *Kirk v. Seattle Electric Co*..... 283

7. SAME — RIGHTS OF PASSENGERS — TRANSFERS — FORCE — TESTING RIGHTS. A passenger on a street car, denied the right to a transfer or to a ride on a second car without paying another fare, is not justified in inviting the application of force to eject him, but it is his duty to withdraw and test his right in the courts. *Kirk v. Seattle Electric Co*..... 283

8. SAME—EJECTION OF PASSENGER—FORCE NECESSARY. Where a passenger refuses to pay his fare on a street car, the conductor may eject him, using no more force than is necessary, the amount of force necessary being measured by the force of the resistance offered, in which case the same will not be weighed with nicety. *Kirk v. Seattle Electric Co*..... 283

9. SAME—FAILURE TO PAY FARE—OFFER BY THIRD PERSON—REPUDIATION. A passenger ejected from a street car for refusal to pay his fare cannot, in an action for wrongful ejection, avail himself of offers made by other passengers to pay the fare, where at the time he expressly repudiated the offers. *Kirk v. Seattle Electric Co*.. 283

10. SAME—REFUSAL TO PAY FARE—TENDER AFTER EJECTION. After the process of ejection for refusal to pay has begun, either by stopping or applying force, it is too late for the passenger to offer to pay, and the same is no justification for resisting the ejection. *Kirk v. Seattle Electric Co*..... 283

CARRIERS—CONTINUED.

11. CARRIERS—GOODS—CONTRACTS—CONSIDERATION. Where a logging company was insisting upon its right to cross a railway at grade, which was objected to by the railway company, and the parties entered into negotiations to adjust their respective rights, and by mutual concessions reached an agreement in which all their differences were settled by the railway company's agreeing to carry logs at a certain rate, the agreement was intended as, and had all the essential elements of, a contract. *Sultan R. & Timber Co. v. Great Northern R. Co.*..... 604

12. SAME—CONTRACTS—MUTUALITY. An agreement by a railway company to carry at a certain rate, all of the logs that a logging company should tender for carriage, is not void for lack of mutuality, where there was an independent consideration in that the logging company forbore its right to cross the railway at grade, so long as the rate was continued, although there was no agreement to ship any quantity of logs. *Sultan R. & Timber Co. v. Great Northern R. Co.* 604

13. SAME—CONTRACTS—CONSIDERATION—DISPUTED CLAIMS. A logging company's forbearance of a right claimed by it to cross a railway at grade constitutes a sufficient consideration for a contract by the railway company to carry logs at a certain rate, whether the claim for the grade crossing was well founded or not, where the parties treated it as a right and contracted with reference to it. *Sultan R. & Timber Co. v. Great Northern R. Co*..... 604

14. SAME—CONTRACTS—CONSTRUCTION. A letter by a railway company to a logging company agreeing to carry "your" timber at a certain rate, will be construed to refer not only to timber owned by the logging company at the time, but to any tributary timber which it might tender for carriage, where the same was under discussion at the time the negotiations were carried on between the parties, and the logging company made known its purpose to acquire such other timber. *Sultan R. & Timber Co. v. Great Northern R. Co.*. 604

15. SAME—DISCRIMINATION—CONTRACTS—VALIDITY. The law prohibiting discrimination between shippers is not violated by a contract of a railway company to carry the logs of a logging company between certain points at a specified rate, where part of the consideration therefor was the logging company's forbearance of the right to cross the railway at grade; and such contract is not void as against public policy. *Sultan R. & Timber Co. v. Great Northern R. Co*..... 604

16. SAME—DISCRIMINATION—STATUTES—CONSTRUCTION. The railway commission law, Rem. & Bal. Code, § 8627 *et seq.*, prohibiting discrimination between shippers by common carriers, does not prevent a railway company from entering into a contract with a shipper to carry particular goods at a fixed rate for a given time, or to the amount of a given quantity. *Sultan R. & Timber Co. v. Great Northern R. Co.* 604

CARRIERS—CONTINUED.

17. SAME—EVIDENCE OF DISCRIMINATION. The fact that a railway company's published tariff of rates is greater than the amount agreed upon between the railway and a logging company for the carriage of its logs is not conclusive evidence that the latter is discriminatory, where an independent consideration passed between the parties in addition to the rates charged. *Sultan R. & Timber Co. v. Great Northern R. Co.* 604

18. SAME—DEGREE OF PROOF. Where a railway company seeks to avoid a contract to carry goods on the ground that the same is void as against public policy, it must, as between itself and the carrier, establish the invalidity by direct evidence of the fact. *Sultan R. & Timber Co. v. Great Northern R. Co.* 604

CATTLE:

Carriage of live stock, see CARRIERS, 1-4.

CERTAINTY:

Of contract as affecting right to specific performance, see SPECIFIC PERFORMANCE, 2.

CERTIFICATE:

Filing of certificate showing business name, see PARTNERSHIP, 1.

By architect as evidence of damage in default of contractor, see PRINCIPAL AND SURETY, 8.

CERTIORARI:

Consideration of application for and motion to advance hearing of appeal as dependent on filing record, see APPEAL AND ERROR, 16.

Review of condemnation proceedings, see EMINENT DOMAIN, 15.

1. CERTIORARI—WHEN LIES—ORDERS REVIEWABLE ON APPEAL. A writ of certiorari does not lie to review an order that is not appealable because reviewable upon appeal from the final judgment. *Wilson v. McGillivray* 291

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 4.

CHAMPERTY AND MAINTENANCE:

1. CHAMPERTY AND MAINTENANCE—DEFENSE—WHEN AVAILABLE. In an action upon a guaranty of an assignment, the defense that the assignment was champertous is not available, since a champertous contract can be relied upon as a defense only in an action wherein it is sought to be enforced. *Weed v. Foster* 675

2. SAME—CONTRACTS CONSTITUTING—ASSIGNMENT OF CAUSE—BARRATRY. An assignment of a part of a recovery arising out of an alleged tort, in consideration of advancing money for costs, is not champertous; especially in view of Rem. & Bal. Code, § 2970 defining barratry as wilfully maintaining suits in which a party has no interest. *Weed v. Foster* 675

CHANGE OF VENUE:

Of civil actions, see VENUE.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 4, 5, 9.
To jury in civil actions, see TRIAL, 2.

CHARTER:

Amendment of charter of municipal corporation, see MUNICIPAL CORPORATIONS, 1-3.

CHILD:

Rights, duties and liabilities of parents and children incident to the existence of the relation, see PARENT AND CHILD.

CITATION:

See PROCESS.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 3.

CIVIL RIGHTS:

Constitutional guaranty of civil rights, see CONSTITUTIONAL LAW, 1.
Deprivation of life, liberty, or property without due process of law, see CONSTITUTIONAL LAW, 4.

CLAIMS:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.
For exemption, see EXEMPTIONS, 3.
Against surety, see INDEMNITY, 10, 11.
Costs in contesting probate of will as claim against estate, see WILLS, 1.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 3.

CLERKS OF COURTS:

Employment by county commissioners for justices of the peace, see COUNTIES.
Verification of information by deputy clerk, see INDICTMENT AND INFORMATION.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL AGREEMENT:

As defense in action on note, see BILLS AND NOTES, 2.

COLLATERAL ATTACK:

On judgment, see JUDGMENT, 3.

COLLECTION:

Of taxes, see TAXATION, 1.

COLLISION:

Negligence of driver of vehicle imputed to occupant, see NEGLIGENCE, 5.

Between street cars or with vehicles, see STREET RAILROADS.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

Inspection of grain, see INSPECTION.

Interstate commerce and liability to injured employee, see MASTER AND SERVANT, 5. 6.

COMMISSIONERS:

Authority to employ baliffs or clerks for justices of the peace, see COUNTIES.

COMMISSIONS:

Of Broker, see BROKERS.

Recovery for loss of profits by broker in action for breach of contract, see DAMAGES, 3.

Amendment of charter creating municipal plans commission, see MUNICIPAL CORPORATIONS, 1-3.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

In general, see HUSBAND AND WIFE, 3, 4.

COMPENSATION:

For use of property, see BAILMENT.

Of broker, see BROKER.

Subscription for stock, see CORPORATIONS, 1.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For property taken for public use, see EMINENT DOMAIN.

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Damages to property from filling low lands, see MUNICIPAL CORPORATIONS, 4, 5, 8, 10.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 14.

Of juror, see JURY, 1, 4.

Of witnesses in general, see WITNESSES, 1.

COMPROMISE AND SETTLEMENT:

As estopping heirs from claiming property, see EQUITY.
Relinquishment of right or claim by release thereof, see RELEASE.
Effect of partial payment and acceptance on right to recover balance of contract price, see SALES, 5.

CONCEALMENT:

Of facts as avoidance of policy, see INSURANCE, 2-4.

CONCLUSION:

Of witnesses, see EVIDENCE, 8-14.

CONCLUSIVENESS:

Of finding of public use and necessity, see EMINENT DOMAIN, 11.
Of findings in lien foreclosure suit, in action on bond, see INDEMNITY, 7.
Of judgment, see JUDGMENT, 4, 5.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

See SALES, 15.

CONDITIONS:

Precedent to action under factory act law, see MASTER AND SERVANT, 9.
Precedent to action by firm, see PARTNERSHIP, 1.
Precedent to action to quiet title, see QUIETING TITLE.
Precedent to action to vacate tax deed, see TAXATION, 4.

CONDUCT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 3.

CONFIRMATION:

Of execution sale, see EXECUTION.

CONFLICT OF LAWS:

Marriage in one country after divorce in another, see DIVORCE, 4-6.
Presumptions as to laws of other country, see EVIDENCE, 2.
State laws in conflict with treaties, see TREATIES, 1.

CONSIDERATION:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1.
Contract for carriage of goods, see CARRIERS, 11, 13.
Of contract in general, see CONTRACTS, 4.
For stock subscription, see CORPORATIONS, 1.
Of release, see RELEASE, 2.
Special finding by jury inconsistent with verdict, see TRIAL, 3.

CONSTITUTIONAL LAW:

Condemnation of property, see EMINENT DOMAIN, 7.
Invalidity of law as ground for release, see HABEAS CORPUS.
Sale of intoxicating liquor to Indians, see INDIANS.
Tax for inspection of grain shipped, see INSPECTION.
Right to trial by jury, see JURY, 3.
Delegation, extent and exercise of police power by municipalities, see MUNICIPAL CORPORATIONS.
Amendment of city charter creating municipal plans commission, see MUNICIPAL CORPORATIONS, 1-3.
Assessments for local improvements, see MUNICIPAL CORPORATIONS, 9-11.

1. CONSTITUTIONAL LAW—RIGHTS OF ACCUSED—CRIMINAL LAW—NOTICE OF NATURE OF OFFENSE—WAIVER. Const., art. 1, § 22, providing that the accused shall have a right to demand a copy of the charge against him, and Rem. & Bal. Code, § 2091, providing that such copy shall be served, merely grant a privilege that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional. *State v. Newcomb* 414

2. CONSTITUTIONAL LAW—EX POST FACTO LAW—JURORS—SELECTION. An act changing the method of selecting jurors in criminal cases is not an ex post facto law, as it affects only the remedy or method of procedure. *State v. Newcomb* 414

3. CONSTITUTIONAL LAW—CLASS LEGISLATION—LICENSES—OCCUPATION TAX—DISCRIMINATION. A city ordinance providing a license tax upon the sale of goods of any kind by means of any automatic device violates the constitutional prohibition against granting to any citizens special privileges and immunities which upon the same terms do not equally belong to all citizens; since it discriminates against a simple mode of doing business which is conceded to be lawful and fair, and in no way involves the police power. *Seattle v. Dencker* 501

4. CONSTITUTIONAL LAW—DUE PROCESS—RAILROADS—REGULATION—REQUIRING SPUR TRACKS. An order of the railroad commission compelling a railroad company to construct and operate a spur track from its main line to a private sawmill, without compensation, is a taking of private property without due process of law, in contravention of the fourteenth amendment to the Federal constitution. *Northern Pac. R. Co. v. Railroad Commission* 360

CONSTRUCTION:

Of statute authorizing county aid to fair association, see AGRICULTURE.
Of contract to carry logs, see CARRIERS, 14, 16.
Of contracts, see CONTRACTS, 1-3.
Of stock subscription agreement, see CORPORATIONS, 1.
Repeal of criminal statutes and effect of savings clause, see CRIMINAL LAW, 1, 2.

CONSTRUCTION—CONTINUED.
Of application for life insurance, see INSURANCE, 1, 7.
Of contract of sale, see SALES, 1-3.
Of statutes, see STATUTES.
Of treaty granting right of disposal and right of succession to property by aliens, see TREATIES, 3, 4, 6, 7.

CONTEST:
Contesting probate of will, see WILLS.

CONTRACTS:
Obligations implied or imposed by law, see ACCOUNT STATED.
Bailment, see BAILMENT.
Exemption from liability for negligence, see CARRIERS, 1, 2.
Transportation of goods, see CARRIERS, 11-18.
Champertous contracts, see CHAMPERTY AND MAINTENANCE.
Subscription to corporate stock, see CORPORATIONS, 1-3.
Evidence of custom, see CUSTOMS AND USAGES.
Damages for breach, see DAMAGES, 3.
Admission of parol or extrinsic evidence, see EVIDENCE, 5-7.
Of married women, see HUSBAND AND WIFE, 3.
Of indemnity, see INDEMNITY.
Of insurance in general, see INSURANCE.
Medium of payment on breach, see PAYMENT.
Of suretyship, see PRINCIPAL AND SURETY.
Release of rights, see RELEASE.
Sales of personalty, see SALES.
Employment of teachers, see SCHOOLS AND SCHOOL DISTRICTS.
Specific performance, see SPECIFIC PERFORMANCE.
Special finding as to consideration for agreement as inconsistent with verdict, see TRIAL, 3.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS—CONSTRUCTION—PRINTED HEADINGS. Printed matter on letter heads not referred to either in an order for the sale of goods or in the acceptance is not a part of the contract. *Menz Lumber Co. v. McNeeley & Co*.....223

2. CONTRACTS—WRITING—CONSTRUCTION—PROVINCE OF COURT. Where an order and acceptance is in writing and not ambiguous, it is for the court to construe it, and it is error to instruct the jury that they are to determine what the contract was. *Menz Lumber Co. v. McNeeley & Co*..... 223

3. CONTRACTS—BUILDING CONTRACTS — CONSTRUCTION — INDEMNITY — BREACH OF CONTRACT—ACTIONS—ACCRUAL. A contract whereby defendant was to furnish all labor and material to completely finish the painting, tinting, and staining of a building, for a consideration of so much per hour for his own labor and his workmen, and actual cost of material, etc., to be advanced by the plaintiff, "guaranteeing and agreeing" that the total cost should not exceed $1,500, is one

CONTRACTS—CONTINUED.

to fully perform for the sum of $1,500 or less, and not merely a contract of indemnity; and the owner's right of action to recover as damages the difference between the contract price and his actual cost in completing the work accrues as soon as the contract is breached. *Gordon v. Gillespie*..... 627

4. CONTRACTS—ORAL RESCISSION—CONSIDERATION. Where a subcontractor refused to perform and was about to abandon a written contract, the contract may be orally rescinded, and the principal contractor's oral agreement to pay an additional sum is not without consideration or *nudum pactum*, but an election to make a new contract rather than recover damages. *Evans v. Oregon & Washington R. Co.* 429

5. CONTRACTS—SURVIVAL—PARTIES—PERSONAL REPRESENTATIVES. The obligations of a building contract which provides that it shall bind the parties, their heirs, and personal representatives, survives on the death of the contractor and binds his administrator. *Macdonald v. O'Shea* 169

CONVEYANCES:

Description of boundaries, see BOUNDARIES,.
In general, see DEEDS.
By husband or wife, see HUSBAND AND WIFE, 1, 2

CORPORATIONS:

Consideration for personal note of president, see BILLS AND NOTES, 1.

1. CORPORATIONS—STOCK — SUBSCRIPTIONS — CONSTRUCTION — FREE OF ASSESSMENT. An agreement that a stockholder was to receive 100,000 shares of stock "free of assessment" until stock held by other stockholders had been paid for in full, does not mean "free from any charge or payment" so as to relieve the stockholder from paying for his stock in the first instance. *Cunningham v. Independence Consolidated Min. Co*..... 371

2. SAME—RIGHTS OF STOCKHOLDERS—ACTIONS—EQUITY. Equity will not give relief to a stockholder of a corporation, who, in bad faith made arrangements with a creditor whereby the corporation's property was subjected to execution sale, under an agreement whereby the same was to be redeemed and deeded to the stockholder, who tried to defeat a redemption by the corporation when he might have paid the judgment or redeemed and held as equitable owner for the company. *Cunningham v. Independence Consolidated Min. Co*... 371

3. SAME—LACHES. An action by one claiming stock in a corporation and for an accounting and equitable relief is barred by laches, where he was not diligent in the prosecution of his remedy for breach of the contract for his stock, but delayed seven years after knowledge of the breach, during which time he jeopardized the prop-

CORPORATIONS—CONTINUED.

erty of the corporation and subjected it to forced sale to the end that the title should come under his personal control. *Cunningham v. Independence Consolidated Min. Co.* 371

4. CORPORATIONS—OFFICERS—REPRESENTATIONS—IMPUTED KNOWLEDGE. Where a report was made to the directors of a corporation that an employee's books were examined by a bookkeeper on a certain day and that the cash deposited exceeded the receipts, the corporation is put upon inquiry and charged with such knowledge as a cursory examination would have revealed, so as to be bound by representations to the contrary made by an officer. *Poultry Producers' Union v. Williams* 64

5. CORPORATIONS—OFFICERS—INSPECTION OF BOOKS—STATUTES—PENAL STATUTES. Rem. & Bal. Code, §§ 3701, 3702, requiring corporations to keep a stock book and allow an inspection thereof and of papers filed, and providing that any officer failing to do so shall forfeit and pay to the injured party a penalty of not less than $100 or more than $1,000, and all damages resulting therefrom, is a penal statute in so far as the penalty is concerned, and to be strictly construed; since the penalty is not given as compensation for any injury, and was intended as a punishment, allegation and proof of actual injury being unnecessary. *Brown v. Kildea* 184

6. SAME. Construing strictly that portion of Rem. & Bal. Code, § 3702, imposing a penalty in favor of the "injured party" upon any officer of a corporation who shall refuse to exhibit to a stockholder or creditor the stock book or any papers "placed on file," in order to subject an officer to the penalty there must be a demand for inspection of the book named or a designated paper or papers lodged with and kept by the corporation pertaining to the corporate business, and the demand must be made by a party having an interest in such inspection; a demand to inspect the "book and papers" not being sufficient. *Brown v. Kildea* 184

COSTS:

Of former suit as damages, see INDEMNITY, 8.
Allowance on contesting probate of will, see WILLS.

1. COSTS—DISBURSEMENTS—DEPOSITIONS. Under Rem. & Bal. Code, § 482, authorizing the allowance of costs for the necessary expenses of taking depositions, to be proved by affidavit, costs may be taxed for the notary's fees, although he failed to indorse the same on the deposition; and also for depositions taken on stipulation containing no provision for such taxation. *Pillsbury v. Beresford* 656

2. COSTS—WITNESS FEES—WIFE OF PARTY. Upon judgment for the defendant, costs may be taxed for the witness fees of his wife, although she was a competent party defendant and might have been joined as such. *Noon v. Mironski* 453

COSTS—CONTINUED.

3. COSTS—ON APPEAL. Upon reversal of case with directions for judgment and allowance of certain expenses as costs, the amount of which does not appear in the record on appeal, the costs allowable are to be submitted to and determined by the lower court. *Sheard v. United States Fidelity & Guaranty Co* 29

4. COSTS—APPEAL—FILING BRIEFS. Costs will not be allowed respondents, on affirming a judgment, where they failed to file a brief after being granted permission to do so. *McCormick v. Sorenson* 107

5. COSTS—ON APPEAL—FOR PRINTING BRIEFS. Where the case was a simple one and could have been presented in a brief of 75 pages, costs of printing a brief of 240 pages will not be allowed in excess of the usual sum for a brief of the smaller size. *Brown v. Kildea*..184

6. COSTS—ON APPEAL—OF APPEAL BONDS. Under Rem. & Bal. Code, § 6226, providing that any receiver, assignee, trustee, guardian, executor, etc., may include as part of his lawful expenses a reasonable sum paid to a corporation for a surety bond, and that the party entitled to recover costs may include the same in all actions and proceedings, costs on appeal will be allowed for the premium paid for a surety company's bond upon appeal given by a receiver, trustee, etc. *Church v. Wilkeson-Tripp Co*..... 262

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

Appropriation in aid of state fair association, see AGRICULTURE.
Control and regulation of liquor traffic, see INTOXICATING LIQUORS, 1, 2.
Jury districts, see JURY, 3.
Negligence of officer in preventing payment of taxes, see TAXATION, 5.

1 COUNTIES—COMMISSIONERS—POWERS—JUSTICES OF THE PEACE—APPOINTMENT OF ASSISTANT CLERKS. Justices of the peace not being county officers, under our constitution, their offices pertaining to judicial business, the county commissioners, under their general authority and control over county business and officers, are not authorized to employ bailiffs or assistant clerks for justices of the peace, the legislature having expressly authorized the employment of one clerk for each justice of cities of the first and second classes. *McElwain v. Abraham* 26

COURSES AND DISTANCES:

See BOUNDARIES.

COURTS:

Review of decisions, see APPEAL AND ERROR.
Construction of contract, see CONTRACTS, 2.
Determination of amount of costs on reversal, see COSTS, 3.

COURTS—CONTINUED.

Determining amount of attorney's fees in divorce, see DIVORCE, 1-3.
Condemnation proceedings, see EMINENT DOMAIN.
Taking or damaging of property as judicial question, see EMINENT DOMAIN, 1.
Conclusiveness of judgments, see JUDGMENT, 4, 5.
Power to vacate judgment, see JUDGMENT, 1.
Authority and power to provide juries, see JURY, 2.
Exercise of police power to fill low lands as judicial question, see MUNICIPAL CORPORATIONS, 7.
Province of court and jury, see TRIAL, 1.

1. COURTS—JURISDICTION—DEPARTMENTS. There being but one superior court in a county, it is not error to refuse to transfer a cause for trial from one department to another in which preliminary orders had been made, as the court has jurisdiction. *State v. Newcomb*..414

CREDIBILITY:

Of witness, see WITNESSES, 3-5.

CRIMINAL LAW:

See ASSAULT AND BATTERY; HOMICIDE.
Constitutional guaranty of accussed to demand copy of charge, see CONSTITUTIONAL LAW, 1.
Change in method of selecting jurors as ex post facto law, see CONSTITUTIONAL LAW, 2.
Right to discharge on habeas corpus on ground of unconstitutional statute, see HABEAS CORPUS.
Right to trial by jury, see JURY, 3.
Change of venue, see VENUE.

1. CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. The savings clause in the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing in this act shall apply to an offense committed before the day when this act shall take effect and that such offense shall be punished under existing laws as if this act had not been passed, is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect. *State v. Newcomb* 414
State v. Ware..... 526

2. SAME. Rem. & Bal. Code, § 2006, passed at the extraordinary session of 1901, was a general savings clause applicable to the repeal or amendment of all criminal statutes unless a contrary intention is expressly declared therein, and is sufficient to continue in force the laws repealed by the penal code of 1909 during the interim between the passage and the taking effect of such penal code. *State v. Newcomb* 414

CRIMINAL LAW—CONTINUED.

3. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. It is not misconduct of counsel requiring a new trial for counsel for the state in argument to the jury to state his opinion that the accused is guilty of murder in the first degree. *State v. George* 681

4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS—APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY. In a prosecution for murder, an instruction that there is no evidence to justify a verdict of manslaughter is not improper comment on the facts, if such is the case; and error cannot be predicated thereon where the evidence is not brought up by bill of exceptions or statement of facts. *State v. Newcomb* 414

5. CRIMINAL LAW—INSTRUCTIONS—COMMENT ON EVIDENCE—WITHDRAWING ISSUE FROM JURY. Where the accused admitted committing a homicide, following a dispute relative to articles of property alleged by the deceased to have been stolen by the accused's son, it is not an unlawful comment on the evidence for the court to withdraw from the consideration of the jury the merits or demerits of the controversy over the articles, as having nothing to do with the issue of self-defense, which was the only issue. *State v. Ware*..... 526

6. CRIMINAL LAW—TRIAL—JURORS—SEPARATION. Rem. & Bal. Code, § 2159, providing that jurors shall not be allowed to separate except by consent of the accused, applies only to jurors sworn to try the cause, and not to jurors sworn on their *voir dire*, as to whom it is discretionary to allow a separation on adjournments before the panel is complete. *State v. Clark* 128

7. CRIMINAL LAW—TRIAL—SEPARATION OF JURORS. It is not error to allow jurors in a criminal case to separate during a recess after being selected, before they are sworn to try the case, as the state applies only to juries selected and sworn. *State v. Newcomb* 414

8. CRIMINAL LAW—APPEAL—RECORD—REVIEW—BILL OF EXCEPTIONS. While a statement of facts or bill of exceptions furnishes the only method of preserving exceptions for review, upon appeal from a conviction of murder in the first degree, the state's motion to strike such matter in the transcript as could only be brought up by bill or statement may be denied by the supreme court, and such exceptions reviewed as are sufficiently shown by the transcript and other matter not within the record. *State v. Newcomb* 414

9. CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. An argumentative instruction to the jury is not ground for reversal where it does not misstate any principle of law and from the evidence the jury could not have returned any other verdict. *State v. Wilson* 123

CROSS-EXAMINATION:

See WITNESSES, 2.

CROSSINGS:

Accidents at railroad crossings, see RAILROADS, 2.

CUSTODY:

Of jury, see CRIMINAL LAW, 6-7.
Of children, see PARENT AND CHILD.

CUSTOMS AND USAGES:

Judicial notice, see EVIDENCE, 1.

1. CUSTOM AND USAGE—EVIDENCE—TO VARY WRITING—SALES. Parol evidence of a general or special custom in the shingle trade that accepted orders were contingent upon the exigencies of transportation and expired where delivery was unavoidably delayed for a reasonable time, is inadmissible to vary or control the terms of an unconditional written acceptance, as the same would be repugnant to the contract. *Menz Lumber Co. v. McNeeley & Co.*..... 223

DAMAGES:

For breach of contract for commissions on sale of bonds, see BROKERS.
For wrongful death, see DEATH.
Compensation for appropriation under power of eminent domain, see EMINENT DOMAIN.
Opinion evidence as to damages, see EVIDENCE, 11.
Breach of building Contract, see INDEMNITY, 4-6, 8.
Injuries from public improvements, see MUNICIPAL CORPORATIONS, 4, 5, 8, 10.
Certificate of architect as evidence of on contractor's default, see PRINCIPAL AND SURETY, 8.
Release of claim for damages, see RELEASE.
For breach of contract for sale of goods, see SALES, 11, 13, 14.
Loss of rentals during delay in delivery of machine, see SALES, 10.
Breach of warranty, see SALES, 7.
As counterclaim in action for injunction, see SET-OFF AND COUNTERCLAIM.
For wrongful opening of telegram, see TELEGRAPHS AND TELEPHONES.
Special findings of jury inconsistent with verdict, see TRIAL, 3.
Diversion of water course, see WATERS AND WATER COURSES, 4-7.

1. DAMAGES—PERSONAL INJURIES—PROXIMATE CONSEQUENCES—EXPENSE ITEMS. In an action for an assault, expenses of the plaintiff and his wife while traveling over the country for over a year, including fares, meals, berths, and board bills, are not damages naturally and proximately flowing from the injuries, except as advised by his physician as necessary and proper elements in his recovery, and then only as to items which would not be included in necessary expenses had he remained at home; and items for his wife's expenses only in case he could not travel without her. *Kirk v. Seattle Electric Co.* 283

DAMAGES—CONTINUED.

2. SAME—LOSS OF PROFITS—DIMINISHED EARNING CAPACITY. In an action for injuries sustained in an assault, estimates of profits and commissions in the business of getting out special editions of newspapers, the commissions depending upon the financial success of the ventures, are to remote and speculative to be recoverable; the proper element of damage being the diminution of plaintiff's earning capacity determined by what he was capable of earning before and after the injury. *Kirk v. Seattle Electric Co.* 283

3. DAMAGES—BREACH OF CONTRACT—CONTEMPLATED PROFITS—BROKERS—COMMISSIONS. Brokers seeking damages for breach of a contract to sell bonds on commission may recover for loss of profits, since the same are directly contemplated in the contract; but the loss must be reasonably certain, to be ascertained by the jury, although not always capable of precise computation. *Church v. Wilkeson-Tripp Co.* 262

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $25,000 for the loss of both hands by a boy thirteen years of age is not excessive. *Olson v. Gill Home Investment Co.* 151

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

Survival of contract on death of party, see CONTRACTS, 5.
Dying declarations in prosecutions for homicide, see HOMICIDE, 2.
Liability of surety for defaults of administrator, see INDEMNITY, 9.
Of insured as terminating agency for purpose of paying premiums, see INSURANCE, 11.
Objection to defect of parties in action for wrongful death, see PARTIES.
Evidence of cause of death, see RAILROADS, 2.

1. DEATH—EXCESSIVE DAMAGES. A verdict for $20,000 for the death of a railroad brakeman is excessive, and should be reduced to $15,000, where the deceased was forty-four years of age, earning $100 to $120 per month, with a life expectancy of twenty-five years. *Walters v. Spokane International R. Co.* 293

DECEDENTS:

See EXECUTORS AND ADMINISTRATORS.
Disposition of property and right of succession by alien heirs, see TREATIES.
Testimony as to transactions with persons since deceased, see WITNESSES, 1.

DECISION:

On appeal, see APPEAL AND ERROR, 31.

DECLARATIONS:

Of employee as part of res gestae, see EVIDENCE, 3.
Of agent as admission against interest, see EVIDENCE, 4.
Dying declarations, see HOMICIDE, 2.

DEEDS:

Description of boundaries, see BOUNDARIES.
Cancellation of, see CANCELLATION OF INSTRUMENTS.
Between husband or wife, see HUSBAND AND WIFE, 1.
Tax deeds, see TAXATION, 3-6.

1. DEEDS—EXECUTION—VALIDITY — MENTAL CAPACITY — EVIDENCE — SUFFICIENCY. The evidence is insufficient to show mental incapacity to execute a deed, where it appears that the parties to the deed were brothers, who had lived together as bachelors and accumulated considerable property held by them in common under an agreement that the first to die should execute a deed to the survivor to avoid a testamentary disposition of the property, that the deed was executed the day after the grantor was taken to a hospital suffering from an illness from which he died a month later, that three witnesses present at the time clearly established that he fully understood the nature of the business, and the only evidence to the contrary being that of nonexperts as to the grantor's appearance during his stay at the hospital. *Jackson v. Lamar* 383

2. DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY. Possession of a deed by the grantee raises a strong presumption of a delivery, which is not overcome by the evidence of an extreme partisan, disappointed in not receiving a portion of the estate granted, who testified, seven years after the occurrence and several years after the death of both parties to the deed, that the grantor, who was on his deathbed at the time and had executed a deed to his brother, pursuant to a previous agreement, directed the notary to take care of the deed until he called for it, which he would do as soon as he got well; the notary having testified that the grantor executed the deed in order, as he stated, that his brother should have the estate in case of his death. *Jackson v. Lamar* 383

3. DEEDS—EXECUTION—EVIDENCE TO CONTRADICT—SUFFICIENCY. Evidence contradicting a certified copy of the record of a deed, and showing that the grantors did not in fact execute and acknowledge the same, must be "clear, cogent and convincing;" and is insufficient where it merely appears that one of the grantors, on an improper cross-examination, could not say whether she executed the deed, and she did not deny that she had acknowledged it, having left everything to her attorney, and the attorney testified that the deed had been executed and delivered for the purpose of conveying the title. *Thompson v. Schoner* 642

DEFAULT:

Of contractor, see PRINCIPAL AND SURETY, 6-8.

DEFECTS:

In title defeating contract of sale of land, see VENDOR AND PURCHASER, 3, 4, 10.

DEGREES:

Reducing crime to lower degree, see HOMICIDE, 1, 3.

DELAY:

Laches, see EQUITY.
In delivery of goods sold, see SALES, 10.

DELIVERY:

Of deed, see DEEDS, 2.
Of goods sold, see SALES, 1, 2, 10, 12-14.

DEMAND:

For inspection of books or papers, see CORPORATIONS, 6.

DEMURRER:

As mode of objecting to defects as to parties, see PARTIES.

DEPARTMENT:

Jurisdiction and departments of superior courts, see COURTS.

DEPOSITIONS:

Taxation of costs for taking, see COSTS, 1.

DEPOSITS:

In bank, action to recover, see BANKS AND BANKING.

DESCENT AND DISTRIBUTION:

Disposal and succession to property by aliens, see TREATIES.

DESCRIPTION:

Of property conveyed, see BOUNDARIES.

DISBURSEMENTS:

See COSTS, 1.

DISCHARGE:

From liability on bills or notes, see BILLS AND NOTES, 3.
Of execution, see EXECUTION.
On habeas corpus, see HABEAS CORPUS.
From liability as insurer, see INSURANCE, 4, 5, 9, 10-12.
From liability as surety, see PRINCIPAL AND SURETY, 1-5.
From claim for damages, see RELEASE.

DISCRETION OF COURT:

Dissolution of attachment, see ATTACHMENT.
Refusal to grant separate trial, see EMINENT DOMAIN, 10.
To permit answer to hypothetical questions, see EVIDENCE, 13.
Allowance of attorney's fees to administrator, see EXECUTORS AND ADMINISTRATORS, 2, 3.
Opening or vacation of judgment, see JUDGMENT, 1.
New trial, see NEW TRIAL, 1.
Cross-examination of witness, see WITNESSES, 2.

DISCRIMINATION:

Validity of contract of carriage, see CARRIERS, 15-17.
Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW, 3.

DISMISSAL AND NONSUIT:

Cessation of controversy as ground of dismissal, see APPEAL AND ERROR, 4.
Right of codefendant to allege error in granting of nonsuit, see APPEAL AND ERROR, 8.
Estoppel to take appeal from judgment of dismissal, see APPEAL AND ERROR, 9.
Failure to print findings and conclusions as ground for dismissal of appeal, see APPEAL AND ERROR, 19.

DISSOLUTION:

Of attachment, see ATTACHMENT.
Of partnership, see PARTNERSHIP, 2.

DISTRICTS:

Creation of jury districts and effect of right to trial before jury of county, see JURY, 3.

DIVERSION:

Of water course, see WATERS AND WATER COURSES, 4-8.

DIVORCE:

1. DIVORCE—ATTORNEY'S FEES—JURISDICTION TO DETERMINE AMOUNT. Rem. & Bal. Code, § 988, authorizing the court to dispose of the property of the parties to an action for divorce does not give the court jurisdiction to determine the questions of compensation arising between the parties and their attorneys; but Rem. & Bal. Code, § 474, leaving such agreements to the parties in civil actions, applies to actions for divorce; hence, in fixing the attorney's fee in divorce, the court considers the circumstances and conditions of the defendant, irrespective of the wife's agreement with her counsel. *State ex rel. Arthur v. Superior Court*..... 97

DIVORCE—CONTINUED.

2. SAME. After awarding a wife a divorce the court has no jurisdiction in the divorce action to amend its decree so as to be a final determination between her and her counsel as to his agreed compensation, although when the parties are properly before the court it can determine the validity and amount of the attorney's lien upon the judgment. *State ex rel. Arthur v. Superior Court* 97

3. SAME—PROHIBITION—WHEN LIES. In such a case, the attorney not being a party, and having no adequate remedy at law or by appeal, prohibition lies to prevent the amendment of the divorce decree in so far as it affects the attorney's right to compensation. *State ex rel. Arthur v. Superior Court*..... 97

4. DIVORCE—MARRIAGE—RIGHT TO REMARRY—DOMICILE—INTENT OF PARTIES. Where a person is divorced in this state, and marries again in another state or country within the prohibited period during which an appeal from the divorce decree could have been taken, in violation of Rem. & Bal. Code, § 991, the validity of the marriage depends upon the domicile of the party at the time of the marriage, the statutes of this state having no extraterritorial force except as to parties domiciled in this state who leave for the purpose of evading the law and returning to their domicile *Pierce v. Pierce*..622

5. DIVORCE—RIGHT TO REMARRY—DOMICILE—EVIDENCE OF INTENT—SUFFICIENCY. Where the validity of a marriage depends upon the domicile of the parties and the legitimacy of a child is involved, all doubts are resolved in favor of its validity; and the evidence is insufficient to show that a divorced woman who married again shortly after in Victoria, B. C., was domiciled in this state and left here with the intent to evade our laws and return, where she testified positively that she objected to such a proceeding on the ground of its illegality, and acted upon a suggestion that she go there to live, being assured that she would like it there, and it appears that the other party to the marriage had his business up for sale, went to Victoria alone, and sent back for her to come and be married, and after the marriage, they returned to this state because he saw no opening for business there, and they then lived in this state as husband and wife, where they had one child. *Pierce v. Pierce*.. 622

6. SAME—ESTOPPEL. In such a case, the man should not be heard to deny the marriage if he induced the woman to leave the state to marry him with an intent to establish a domicile in another country. *Pierce v. Pierce* 622

DOMICILE:

As affecting validity of marriage, see DIVORCE, 4, 5.

DRUGGISTS:

Sale of intoxicating liquors, see INTOXICATING LIQUORS, 3, 4.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 4.

Filling low lands and assessing cost according to area as taking property without due process, see MUNICIPAL CORPORATIONS, 11.

DUES:

Forfeiture of insurance policy for nonpayment, see INSURANCE, 11-12.

DYING DECLARATIONS:

See HOMICIDE, 2.

DYNAMITE:

See EXPLOSIVES, 1.

EARNINGS:

Measure of damages for impairment of earning capacity, see DAMAGES, 2.

EASEMENTS:

In water course, see WATERS AND WATER COURSES, 8.

EJECTION:

Of passengers, see CARRIERS, 6-10.

EJECTMENT:

See QUIETING TITLE.

ELECTIONS:

Number of justices and tenure of office, see JUSTICES OF THE PEACE.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 4-11.

Exercise of right by boom and driving company, see NAVIGABLE WATERS, 2.

1. EMINENT DOMAIN—"TAKING OR DAMAGING" PROPERTY—JUDICIAL QUESTION. What is, or is not, a taking or damaging of private property is a judicial question, and the courts are not bound by a legislative declaration to the effect that the filling of low lands shall not be considered a taking or damaging within the constitutional meaning of those terms. *Bowes v. Aberdeen* 535

2. EMINENT DOMAIN—RIGHTS TO BE ACQUIRED—STIPULATIONS—DAMAGES—RESTRICTIONS. In eminent domain proceedings by a power company seeking to create a storage basin by raising the waters of a lake and flooding lands, the relator may at the trial restrict its use so as to permit the landowner to exercise riparian rights for which he seeks damages, provided that they be exercised without damage to relator's dikes and dams; since the limitations and

EMINENT DOMAIN—CONTINUED.

restrictions may be embodied in the decree and given weight by the jury determining the damages. *Olympia Light and Power Co. v. Harris* 410

3. SAME—RIGHTS TO BE ACQUIRED—STIPULATION—DAMAGES. A railroad company seeking to condemn a right of way, may, when the owners making an unanticipated claim to special damages by reason of injury to a reservoir site and water power, limit the rights sought to be acquired by filing a stipulation or waiver respecting the use of the site, thereby reducing the special damages claimed; and it is error to refuse to instruct the jury that they should take the stipulation into consideration in determining the amount of the award. *Tacoma Eastern R. Co. v. Smithgall* 445

4. SAME—DAMAGES—MEASURE OF DAMAGES. In eminent domain proceedings to appropriate lands to be flooded, the measure of damages is the fair market value of the lands taken irrespective of any benefit, and the damage, if any, to the lands not taken. *Olympia Light and Power Co. v. Harris* 410

5. SAME—DAMAGE TO BUILDINGS—INSTRUCTIONS. In eminent domain proceedings, it is not error to fail to instruct the jury as to damages which the owner might suffer if a building on the premises were removed, where the matters were covered by the general instructions. *Tacoma v. Bonnell* 593

6. SAME. It is not error prejudicial to the owner to instruct the jury that they should determine the value of a building and add its cost to its removal, if it was damaged by its removal and could not be put in as good condition as before, although the instruction goes beyond Rem. & Bal. Code, § 7777, which provides that if the building is taken so that it cannot be readjusted to the premises, the measure of damages is its fair market value; since it was error favorable to the owner. *Tacoma v. Bonnell* 593

7. SAME—"TAKING OF PROPERTY"—MEASURE OF DAMAGES—REMOVAL OF BUILDING. Rem. & Bal. Code, §7777,, providing that, if a part of the building is taken or damaged and the building can be readjusted or replaced on the land remaining, the measure of damages to the building shall be the cost of removing it, is constitutional, it being within the power of the legislature to provide that such a removal is not taking of property, where there was but one tract of land involved. *Tacoma v. Bonnell* 593

8. EMINENT DOMAIN—RIGHTS OF LESSEE—PLEADINGS—INTERVENTION. A lessee of property condemned, being entitled to separate damages, may intervene under Rem. & Bal. Code, § 202, providing therefor if any person has an interest in the subject-matter. *North Coast R. Co. v. Gentry* 82

9. EMINENT DOMAIN—DAMAGES—ASSESSMENT—STATUTES—CONSTRUCTION. In eminent domain proceedings by a city, the jury is to determine only the damage to the land taken and the damages result-

EMINENT DOMAIN—CONTINUED.

ing to land not taken, although the court, in the language of Rem. & Bal. Code, § 7782, instructed them to further find the "gross damages" to any land or property not taken (other than damages to a remainder, by reason of its severance from the part taken), since this covers the same thing or is meaningless. *Tacoma v. Bonnell*.593

10. EMINENT DOMAIN—PARTIES DEFENDANT—SEPARATE TRIALS—DISCRETION—ABUSE. In eminent domain proceedings by a city, all the owners may be joined as defendants, and abuse of discretion in refusing one a separate trial does not appear unless he is deprived of a fair trial and makes an affirmative showing of prejudice. *Tacoma v. Bonnell* 593

11. EMINENT DOMAIN—PUBLIC NECESSITY—FINDING—CONCLUSIVENESS—ANSWER. After an adjudication of public use and necessity in a condemnation proceeding, an answer alleging that the appropriation was sought for other and ulterior purposes is irrelevant, and it is error to refuse to strike it out, where its manifest purpose and tendency was to prejudice the jury. *Tacoma Eastern R. Co. v. Smithgall* 445

12. EMINENT DOMAIN—TRIAL—CONSOLIDATED ACTIONS—SEPARATE VERDICTS. On the trial of actions for the condemnation of separate tracts of land held by different owners consolidated for convenience, in which separate verdicts for the damages were to be rendered, it is error to treat the tracts involved as one tract in the instructions to the jury; and the value of the land taken in each action, and the damage to lands not taken, must be separately determined. *Olympia Light and Power Co. v. Harris*..... 410

13. SAME—DAMAGE—EVIDENCE—ADMISSIBILITY. In eminent domain proceedings to appropriate lands for a storage basin, nonexpert evidence that a ridge one thousand feet wide, proposed to be used as one of the retaining walls, would be insufficient for that purpose and would permit leakage, is inadmissible as conjectural; for if ineffectual, damages could be ascertained and recovered. *Olympia Light and Power Co. v. Harris* 410

14. EMINENT DOMAIN—DAMAGES—EVIDENCE—VALUE OF LAND. In eminent domain proceedings, where all the witnesses testified as to the value of the property as it was at the time of the trial, it will be presumed that the verdict included the value of cement walks that had been laid, and it is not error to exclude evidence of the cost of the walks. *Tacoma v. Bonnell* 593

15. EMINENT DOMAIN—PUBLIC USE—APPEAL—REVIEW—CERTIORARI. Under the rule that appeal does not lie from an order adjudging a public use in condemnation proceedings, no appeal can be taken from an order refusing to vacate an adjudication of a public use; since a review of the question of public necessity can only be obtained by certiorari. *North Coast R. Co. v. Gentry* 80

EMINENT DOMAIN—CONTINUED.

16. EMINENT DOMAIN—APPEAL—HARMLESS ERROR. In condemnation proceedings, the owner is not prejudiced by a stipulation before trial between the relator and an intervening lessee agreeing to the amount of damages to be awarded to the lessee by reason of his leasehold. *North Coast R. Co. v. Gentry* 82

EMPLOYEES:

See MASTER AND SERVANT.

EQUITY:

See CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.
Denial of relief to stockholder, see CORPORATIONS, 2, 3.
Equitable estoppel, see ESTOPPEL.
Relief against judgment, see JUDGMENT, 1, 2.
Defense to suit to quiet title, see QUIETING TITLE.
Subrogation and rights of mortgagee in collecting taxes paid, see TAXATION, 1 .

1. EQUITY—LACHES—ESTOPPEL. Where a divorced wife acquiesced in a property settlement releasing her husband of all claims and demands, and in a decree of divorce finding that there was no "common property," for a period of seventeen years and died without making any claim to other property acquired by the husband for a small sum prior to the decree and settlement, although she knew three years before her death of the time of the acquisition of such other property, she and those claiming under her thirty years after the settlement are estopped by laches from claiming that such other property was the common property of the husband and wife; he having improved it and claimed it as his separate estate. *Boyle v. Oleson* 670

ESTABLISHMENT:

Of boundaries, see BOUNDARIES.

ESTATES:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

See EQUITY.
To take appeal, see APPEAL AND ERROR, 9.
Right to raise question for first time on appeal, see APPEAL AND ERROR, 11.
To deny marriage, see DIVORCE, 6.
By judgment, see JUDGMENT, 4, 5.

1. ESTOPPEL—TO QUESTION EXECUTION SALE. It cannot be urged that judgment debtors are estopped from claiming the invalidity of an execution sale by standing by while title was passing to innocent purchasers, where, under instructions not excepted to, and sufficient evidence, the jury found they were not innocent purchasers. *McLiesh v. Ball* 690

EVIDENCE:

Of account stated between partners, see ACCOUNT STATED.
Of adverse possession, see ADVERSE POSSESSION.
Review of rulings as dependent on motion for new trial in lower court, see APPEAL AND ERROR, 13.
Necessity for incorporating evidence in bill of exceptions, see APPEAL AND ERROR, 13, 15, 18.
Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 14, 15, 18.
Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 27-29.
Sufficiency for dissolution of attachment, see ATTACHMENT.
Compensation for use of property, see BAILMENT.
In action to recover deposit, see BANKS and BANKING.
In action on bill or note, see BILLS AND NOTES, 2, 4.
In action by brokers for breach of contract, see BROKERS.
In suit for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
In action for negligence in shipping live stock, see CARRIERS, 3, 4.
Discrimination in rates between shippers, see CARRIERS, 17, 18.
Costs of documentary evidence, see COSTS, 1.
Comment on evidence by court, see CRIMINAL LAW, 5.
Parol evidence of custom to explain contract, see CUSTOMS AND USAGES.
As to requisites and validity of deeds, see DEEDS.
In divorce proceedings, see DIVORCE, 5.
Condemnation proceedings, see EMINENT DOMAIN, 13, 14.
Of negligence in storing dynamite, see EXPLOSIVES.
In prosecution for homicide, see HOMICIDE, 2, 3.
In insurance policies, see INSURANCE, 3, 6, 8, 10.
For injuries to servant in general, see MASTER AND SERVANT, 1 2.
Official determination of population of city, see MUNICIPAL CORPORATIONS, 12.
Necessity for exercise of police power for purpose of filling low lands, see MUNICIPAL CORPORATIONS, 6.
Newly discovered as ground for new trial, see NEW TRIAL, 2.
Right of parent to custody of child, see PARENT AND CHILD.
For settlement or accounting of partnership, see PARTNERSHIP, 2.
Of agent as to his own authority, see PRINCIPAL AND AGENT.
Of damage on default of contractor, see PRINCIPAL AND SURETY, 8.
Of service of process, see PROCESS, 2.
Defective condition of railroad track, see RAILROADS, 1.
Negligence causing injuries to persons at crossings, see RAILROADS, 2.
Against railroad company for injuries from fires, see RAILROADS, 3.
For price of goods sold, see SALES, 9.
Of acceptance of offer to sell, see SALES, 4.
To show wrongful opening of telegram, see TELEGRAPH AND TELEPHONES.

EVIDENCE—CONTINUED.

To show defects in title, see VENDOR AND PURCHASER, 4.

Extension of time for removal of timber, see VENDOR AND PURCHASER, 1, 2.

Damages from diversion of water course, see WATERS AND WATER COURSES, 4, 6.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE—JUDICIAL NOTICE—CUSTOM—RECORDS. The court will take judicial notice of the custom to record executory contracts for the sale of real estate, and to record instruments affecting the title to real property in Deed Records, incumbrances in Mortgage Records, and evidences of title to personal property in Miscellaneous Records. *Bernard v. Benson* 191

2. EVIDENCE—PRESUMPTIONS—FOREIGN LAWS. In an action on a promissory note executed in a foreign country, it will be presumed, where nothing appears to the contrary, that the laws of that country were the same as our own. *Pitt v. Little* 355

3. EVIDENCE—RES GESTAE—STATEMENTS OF EMPLOYEES—REMOTENESS. Statements made by the conductor of a derailed train to the effect that the accident was caused by the pulling of spikes, the spreading of the rails, and a "bum track," are admissible as part of the *res gestae*, where it appears that he was the company's chief representative in charge of the train, that he went forward and was the first to reach the scene of the accident, where he gave attention to two men fatally injured, that he ran about a mile and occupied some time in sending a long distance telephone for relief, and walked back to the train, where he arrived almost two hours after accident, at which time the statements were made under conditions of responsibility and anxiety tending to render them spontaneous and truthful, without their being the result of reflection or premeditation; the question of remoteness being within the discretion of the trial judge, and to be determined by the circumstances of each case. *Walters v. Spokane International R. Co.*..... 293

4. EVIDENCE—ADMISSIONS—DECLARATIONS OF AGENT—PRINCIPAL AND AGENT. The admission of an agent that his principal's contract had not been performed and would not be enforced, made after the transaction and after the controversy arose, is not competent as an admission against interest, being only an expression of an agent's opinion upon past rights and obligations. *Caldwell Bros. & Co. v. Coast Coal Co.*..... 461

5. EVIDENCE—TO EXPLAIN WRITING—AMBIGUITY—VENDOR AND PURCHASER—CONTRACTS. A contract for the sale of land is ambiguous so as to admit parol evidence of circumstances to show whether the price was $150 per acre, or that sum plus certain mortgages on the land, where it fixed the price at $150 per acre and recited that there were certain mortgages on part of the land, to be released on the

EVIDENCE—CONTINUED.

payment of specified sums, and provided that the purchasers were to pay all the taxes and interest and the mortgage or mortgages as they became due, and if not so paid, the agreement to be inoperative as to the lands covered by the mortgage or mortgages, which was to revert to the vendor. *Whipple v. Lee* 253

6. EVIDENCE—PAROL—TO EXPLAIN WRITING. Parol evidence is admissible to explain the expression "terms—cash with documents attached," used in a contract for the sale of goods to be shipped by the seller. *Phoenix Packing Co. v. Humphrey-Ball Co*..... 396

7. EVIDENCE—TO VARY WRITING—AMBIGUITY—LEASE. A lease of premises "for the purpose of conducting a bakery therein" is not ambiguous so as to permit oral evidence to explain that the clause was intended as a restriction preventing the use of the premises for any other purposes. *Noon v. Mironski* 453

8. EVIDENCE—OPINIONS—CONTEMPLATED PROFITS. The opinion of a witness that brokers could have earned all their commissions on the sale of bonds is inadmissable as a conclusion as to the probable results, and which must be drawn by the jury. *Church v. Wilkeson-Tripp Co*..... 262

9. EVIDENCE—OPINIONS—MENTAL ATTITUDE. The feeling or apparent mental attitude of people who are in frequent association may be shown by the opinions of acquaintances who had opportunity to observe and measure their emotions. *State v. George* 681

10. EVIDENCE—OPINION EVIDENCE—ASSAULT. In an action for assault in the ejection of a passenger from a street car, evidence of expressions of sympathy on the part of his fellow passengers, is incompetent and inadmissible as opinion evidence. *Kirk v. Seattle Electric Co*..... 283

11. EVIDENCE—OPINION EVIDENCE—EXTENT OF DAMAGE. In an action for assault, it is error to allow the plaintiff to give his opinion of the monetary extent of his damages. *Kirk v. Seattle Electric Co.* 383

12. EVIDENCE—OPINIONS—VALUE OF LAND. Evidence of the value of property is not objectionable as based upon what land was offered for, where the witness stated that he based his opinion on not only property he had for sale there, but other properties in the vicinity and in a general way, the witness having duly qualified. *Tacoma v. Bonnell* 593

13. EVIDENCE—HYPOTHETICAL QUESTIONS—DISCRETION. It may not be an abuse of discretion to permit physicians to answer hypothetical questions although some of the facts assumed are based upon meager evidence. *State v. Peacock* 41

14. EVIDENCE—EXPERTS—COMPETENCY—LAND VALUES. Upon an issue as to the value of certain real estate, the competency of a real estate broke is shown, and it is error to exclude his testimony, where it appears that he had been engaged in the real estate busi-

EVIDENCE—CONTINUED.

ness in the city for 19 years, had bought and sold property for himself and others, and was acquainted with city real estate values, and based his knowledge partly upon recorded prices, including sales made by one of the parties, and of other sales in the vicinity known to him, and had appraised other property one block distant. *North Coast R. Co. v. Gentry*. 82

EXCAVATIONS:

Injuries to traveler on public way over private land, see NEGLIGENCE, 1-4.

EXCEPTIONS:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 12, 13.

EXCEPTIONS, BILL OF:

In criminal appeals, see CRIMINAL LAW, 4, 8.
As part of record on appeal, see APPEAL AND ERROR, 18.

EXECUTION:

Consideration for personal note of president of corporation. see BILLS AND NOTES, 1.
Of deeds, see DEEDS.
Estoppel to question execution sale, see ESTOPPEL.
Exemptions from execution and protection of rights of exemption, see EXEMPTIONS.
Showing of payment and void sale as collateral attack on judgment, see JUDGMENT, 3.
Of release, see RELEASE, 1.

1. EXECUTION—SALE—PAYMENT OF JUDGMENT. After payment of a judgment to the plaintiff's authorized agent, a sale on execution thereunder is void, and the lack of jurisdiction to sell is not cured by an order confirming the sale. *McLiesh v. Ball*..... 690

EXECUTORS AND ADMINISTRATORS:

Obligations under contract as binding administrator upon death of party, see CONTRACTS, 5.
Liability of surety for defaults of administrator, see INDEMNITY, 9.
Claim of superintendent as charge against surety on contractor's bond, see INDEMNITY, 10.
Actions by devisees and legatees, see WILLS.

1. EXECUTORS AND ADMINISTRATORS—CLAIM—NECESSITY—MORTGAGES—FORECLOSURE—INDEMNITY. It is not a necessity for a surety on a contractor's indemnity bond to file a claim against the contractor's estate, where it merely seeks to foreclose a mortgage given by the contractor as security for the execution of the indemnity bond. *Macdonald v. O'Shea* 169

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. EXECUTORS AND ADMINISTRATORS—ALLOWANCE FOR SERVICES—INVESTIGATING CLAIMS. It being the duty of an administrator to investigate and report upon all claims of creditors of the estate, an administrator is entitled to an allowance for attorney's fees required for the investigation of a third person's claim to ownership of a half interest in the estate which was based upon mutual accounts and dealings between the deceased and his brother for whom it was alleged deceased held the property in trust; since investigation might prove the claimant to be a creditor, and since the law takes an interest in distributing the estate to the legal heirs. *In re Lichtenberg's Estate* 585

3. SAME — ALLOWANCES — ATTORNEY'S FEES — AMOUNT — DISCRETION. Allowances to administrators for attorney's fees are largely discretionary, and no abuse of discretion appears, considering the value of the estate and all the circumstances, where $1,500 was allowed for the probating of a will and investigating a third person's claim to a half interest in an estate of the value of $62,860, the attorneys having examined books and correspondence, and consulted with New York counsel for claimant during a period of a week or ten days. *In re Lichtenberg's Estate* 585

EXEMPTIONS:

Of carrier from liability in carriage of live stock, see CARRIERS, 1, 2.

1. EXEMPTIONS—PERSONS ENTITLED—FARMERS. Under a liberal construction of Rem. & Bal. Code, § 563, allowing exemptions to a farmer of a team, harness and wagon, "also farming utensils actually used about the farm," a team, harness and wagon need not be actually used about the farm or the farmer living thereon; it is sufficient if farming has been his principal occupation for years, that he had recently moved to town, sold or traded his homestead, and made arrangements to rent a ranch, intending to go upon and farm it. *State ex rel. McKee v. McNeill* 47

2. EXEMPTIONS—PERSONS ENTITLED—ABSCONDING DEBTOR—QUESTION OF FACT. Whether a debtor has forfeited his right to exemptions by reason of the fact that he was about to leave the state with intent to defraud his creditors presents only a question of fact. *State ex rel. McKee v. McNeill* 47

3. EXEMPTIONS—VALUE—APPRAISEMENT—WAIVER — EFFECT. Under Rem. & Bal. Code, § 572, providing for an appraisement of property levied upon when it is claimed as exempt, a creditor who waives the appraisement and directs the sheriff to hold the property is precluded from raising any question as to the value of the property as stated in the debtor's claim of exemption. *State ex rel. McKee v. McNeill*..... 47

EXHIBITS:

Necessity for incorporating in bill of exceptions, see APPEAL AND ERROR, 18.

EXPENSES:

As element of damages, see DAMAGES, 1.

EXPERTS:

Impeachment of reputation for truth and veracity, see WITNESSES, 5.

EXPLOSIVES:

Injuries to employee in loading blast, see MASTER AND SERVANT, 1, 3, 4.

1. EXPLOSIVES — NEGLIGENCE — DANGEROUS PREMISES — TRESPASSING CHILDREN—EVIDENCE—SUFFICIENCY. It is negligence for defendant, in violation of a city ordinance, to needlessly store exposed dynamite, fuse, and caps, not intended for immediate use, upon a shelf in an unlocked toilet on premises frequented by trespassing children, where it was apt to be found and taken, and the defendant is liable for injuries sustained by a boy thirteen years of age, who took the same and was injured in attempting to cause an explosion, the defendant owing in such case the highest degree of care as to trespassing children. *Olson v. Gill Home Investment Co.* 151

2. SAME—PROXIMATE CAUSE—INTERVENING ACTS—QUESTION FOR JURY. In such a case, the negligent act of storing the explosives is the proximate cause of the accident, notwithstanding the criminal act of the boys in stealing the dynamite, fuse, and caps, it being for the jury to determine whether the defendant should have anticipated the result. *Olson v. Gill Home Investment Co.*..... 151

3. SAME—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. A boy thirteen years of age who steals dynamite, fuse, and caps, and knows of its explosive qualities, is not, as a matter of law, guilty of contributory negligence precluding a recovery for injuries received, where he caused an explosion in attempting to pry out the cap with a stick, after unsuccessful attempts to fire the cap. *Olson v. Gill Home Investment Co.* 151

EX POST FACTO LAW:

Constitutional restrictions, see CONSTITUTIONAL LAW, 2.

EXTENSION:

Of time for removal of timber from land, see VENDOR AND PURCHASER, 1, 2.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 9.

FAIRS:

Appropriations by county in aid of state fairs, see AGRICULTURE.

FARES:

Of passengers, see CARRIERS, 5-10.

FARMERS:

Exemption of property from forced sale, see EXEMPTIONS, 1.

FELLOW SERVANTS:

See MASTER AND SERVANT, 3-7.

FIDELITY INSURANCE:

See INSURANCE, 2-4.

FILING:

Statement of facts in lower court, see APPEAL AND ERROR, 16, 18.
Claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 1.
Claim or statement of mechanic's lien, see MECHANICS' LIENS.
Certificate showing firm name, see PARTNERSHIP, 1.
Receipts showing payment of claims by contractors, see PRINCIPAL AND SURETY, 3.
Memorandum of conditional sale, see SALES, 15.

FINAL ORDERS:

Review of, see APPEAL AND ERROR, 1-3.

FINDINGS:

Review as dependent on evidence or exceptions in lower court, see APPEAL AND ERROR, 13, 15.
Printing of, in brief, see APPEAL AND ERROR, 19.
Review on appeal or writ of error, see APPEAL AND ERROR, 21.
Conclusiveness of finding of public use and necessity, see EMINENT DOMAIN, 11.
Conclusiveness of in former action, see INDEMNITY, 7.
Special findings by jury, see TRIAL, 3-5.

FIRES:

Caused by operation of railroad, see RAILROADS, 3.

FORCE:

Application and amount of force in ejection of passenger, see CARRIERS, 7, 8.

FORECLOSURE:

Of tax lien, see TAXATION.

FOREIGN LAWS:

Presumptions as to laws of other country, see EVIDENCE, 2.

FORFEITURES:

Of exemption for execution, see EXEMPTIONS, 2.
Of insurance, see INSURANCE, 4, 5, 9-12.

FORGERY:

Payment of forged paper by bank, see BANKS AND BANKING.

FRAUD:

As ground for attachment, see ATTACHMENT.
Payment of forged paper by bank, see BANKS AND BANKING.
As defense in action on note, see BILLS AND NOTES, 4.
As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
Forfeiture of rights of exemption by absconding debtor, see EXEMPTIONS, 2.
As ground for opening or vacating judgment, see JUDGMENT, 2.

FRAUDULENT CONVEYANCES:

Ground for attachment, see ATTACHMENT.

GAMING:

1. GAMING—PLAYING GAME—STATUTES—CONSTRUCTION. Playing at a game of poker, without having any interest in the place or conducting the game, warrants a conviction under Rem. & Bal. Code, § 2924, providing that each person who "shall deal, (play), or carry on . . . conduct . . ." etc., shall be guilty, etc., the word "play" being part of the original law as enacted in 1881. *State v. Smith* 235

2. GAMING—VERDICT—FORM—SUFFICIENCY. Where an information charged but one offense, the misdemeanor of playing, opening or conducting the game of poker as defined by Rem. & Bal. Code, § 2924, a verdict of "guilty of conducting a game of poker" is sufficient, although by Id., § 2172, the form of "guilty" or "not guilty" is contemplated. *State v. Smith* 235

3. SAME—VERDICT—SUFFICIENCY—OFFENSE CHARGED — INSTRUCTIONS. Upon an information charging only the misdemeanor of playing or conducting a game of poker, defined by Rem. & Bal. Code, § 2924, in which the court erroneously assumed that it charged the felony of keeping a gambling place as "owners, proprietors," etc., and so charged the jury, submitting three forms of verdict, a verdict in the form instructed for the misdemeanor, showing that the jury clearly intended to find the defendants guilty under § 2924, is sufficient to sustain a conviction of the misdemeanor, although technically defective. *State v. Smith* 235

GOOD FAITH:

Of party asking equitable relief, see SPECIFIC PERFORMANCE, 3, 4.

GRAIN:

See INSPECTION.

HABEAS CORPUS:

1. HABEAS CORPUS—GROUNDS OF RELIEF — UNCONSTUTIONALITY OF STATUTE—ILLEGALITY OF PROCESS. Under Rem. & Bal. Code, § 1075, providing that on application for a writ of habeas corpus no inquiry shall be made into the legality of process whereby a party is in custody upon a warrant issued from the superior court on indictment or information, one in custody under a warrant issued upon an information for violating a statute is not entitled to release on habeas corpus on the ground that the statute is unconstitutional. *In re Putnam* 687

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 26-30.
In criminal prosecutions, see CRIMINAL LAW, 9.
In condemnation proceedings, see EMINENT DOMAIN, 16.

HEALTH:

Filling low lands as necessity for public health, see MUNICIPAL CORPORATIONS, 5, 6, 8.

HIGHWAYS:

Accidents at railroad crossings, see RAILROADS, 2.

HOMICIDE:

Opinion of juror as to guilt of accused, see JURY, 4.

1. HOMICIDE—DEGREES—EVIDENCE—ADMISSIBILITY. In a prosecution for the murder of the accused's divorced wife, where evidence that the divorce was granted three years before on the ground of the husband's cruelty was admitted to show probable premeditation and a hostile mental attitude, it is error to refuse to allow the accused to rebut the same by proof of good will and apparent kindly feeling for a year previous to the homicide, in order to reduce the crime to the legal presumption of a lower degree. *State v. George* 681
2. HOMICIDE—EVIDENCE—DYING DECLARATION. A dying declaration made December 10th, does not identify with sufficient certainty a prior written statement signed and sworn to December 3d, at a time when deceased was seriously ill but not under a sense of impending death, where, a few hours before death, the deceased, in answer to questions, stated that the "statements made to Mr. S. (the notary) a week ago today" were true; and the same is inadmissible although the statement of December 10th was made under a sense of impending death, in view of the rule that dying declarations must be received with great caution. *State v. Peacock.* 41
3. HOMICIDE—DEGREES—JUSTIFICATION—BURDEN OF PROOF—INSTRUCTIONS. In a prosecution for homicide, it is proper to instruct that upon proof of the killing being established beyond a reasonable doubt, the presumption of law is that it was murder in the second degree, and that the burden is upon the defendant to justify it or reduce it

HOMICIDE—CONTINUED.

to manslaughter, where there were other proper instructions as to the presumption of innocence, burden of proof, and the definitions of the various degrees of homicide. *State v. Clark* 128

HOSPITALS:

Joint and several judgments against physician and hospital associations for malpractice, see TRIAL, 4, 5..

HUSBAND AND WIFE:

Taxation of witness fees of wife, see COSTS, 2.
Divorce and judicial separation, see DIVORCE.

1. HUSBAND AND WIFE — CONVEYANCE BETWEEN—BONA FIDES—PRESUMPTION. A deed from one spouse to another, reciting a consideration of $10,000, which is not attacked, is presumed to be made to a *bona fide* purchaser for value. *Shorett v. Signor* 89

2. HUSBAND AND WIFE—CONVEYANCES BETWEEN—RIGHTS CONVEYED—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE. A deed from one member of the community to another has the effect to make the land the separate property of the grantee, and this applies to a preference right to purchase shore lands through the conveyance of lots below high water mark, where the community owned the upland, under Rem. & Bal. Code, § 6754, providing that a *bona fide* purchase of such lots from the upland owner gives the purchaser such preference right. *Shorett v. Signor* 89

3. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—PROFITS—COMMUNITY PROPERTY. Under our community property laws authorizing every married woman to hold and dispose of her separate estate as if she were unmarried, the profit made by a married woman upon selling a contract for the purchase of land, prior to payment of the last two installments, is her separate estate and not community property, where she entered into the contract to purchase in her own name, her husband not joining, making the first payment out of separate estate, and giving her personal notes for five subsequent annual installments, and she then had separate moneys sufficient to make all the payments, and make two subsequent payments out of her separate estate; it appearing that she was dealing with her separate estate and that there was no intent to involve the community property. *United States Fidelity & Guaranty Co. v. Lee.* 16

4. HUSBAND AND WIFE—COMMUNITY DEBTS—WRONGFUL ACT OF HUSBAND. Where a married man, engaged in the real estate business, acted as plaintiff's agent in the purchase of property, and misrepresented the price paid, thereby wrongfully making a profit over and above his commissions, the principal may recover a community judgment against the agent and his wife for the difference between the price actually paid by the agent and the amount represented by him as paid; since the wrongful profit made by the agent would be community property. *McGregor v. Johnson* 78

HYPOTHETICAL QUESTIONS:

In examination of expert witnesses, see EVIDENCE, 13.

IMPEACHMENT:

Of witnesses, se WITNESSES, 3-5.

IMPRISONMENT:

See HABEAS CORPUS.

IMPROVEMENTS:

As element of compensation for appropriation of land, see EMINENT DOMAIN, 6, 7.

Public improvements, see MUNICIPAL CORPORATIONS, 4-11.

IMPUTED NEGLIGENCE:

See NEGLIGENCE, 5.

INCONSISTENT POSITION:

Effect of on right to appeal, see APPEAL AND ERROR, 9.

INDEMNITY:

Contracts of indemnity, see CONTRACTS, 3.

Employer's indemnity insurance, see INSURANCE, 2-4.

Contracts of suretyship, see PRINCIPAL AND SURETY.

1. INDEMNITY — BREACH OF BUILDING CONTRACT— LIMITATIONS—ACCRUAL OF ACTION. Under a contractor's indemnity bond, in which the obligee assumes to indemnify the owner against any pecuniary loss resulting from the breach of any of the terms of the building contract, the actual substantial breach does not occur, where liens are filed for labor and material, until the liens become an established charge against the property. *Sheard v. United States Fidelity & Guaranty Co.* 29

2. SAME—CONTRACT AS TO LIMITATIONS—REASONABLENESS. A limitation in a contractor's indemnity bond executed July 22, to the effect that no suit shall be maintained thereon after February 22 following, is unreasonable and therefore not binding on the parties, where the bond indemnified the plaintiff from any pecuniary loss by reason of the contractor's agreement to build a house costing about $15,000, within 120 days, the contractors became insolvent in January following, when a receiver was appointed, who completed the house in June following, and liens for labor and material filed after the time stipulated for bringing suit were not finally established until two years later; since ascertainment of the amount of the loss was not possible until long after the limitation had expired. *Sheard v. United States Fidelity & Guaranty Co.* 29

3. INDEMNITY—CONTRACTOR'S BOND—LIABILITY — UNPAID ATTORNEY'S FEES. A contractor's bond indemnifying against loss by reason of the breach of the building contract being one of indemnity, recovery cannot be had for $1,000 attorney's fees allowed in lien fore-

INDEMNITY—CONTINUED.
closures, where only $250 of the same had been paid by plaintiff before commencing his action on the bond. *Sheard v. United States Fidelity & Guaranty Co.* 29

4. SAME—DAMAGES—LIQUIDATED DAMAGES. Where a building contract provided stipulated damages of $10 per day for each day's delay in completing the building, and authorized a deduction thereof from the contract price, the owner is not obliged to apply any part of such damages to the satisfaction of obligations incurred by the contractor for which an indemnity bond was given. *Sheard v. United States Fidelity & Guaranty Co.* 29

5. SAME. A surety company indemnifying against loss on a building contract, having had the option to assume and complete the building and failed to exercise it, cannot complain of demurrage stipulated as damages for delay in completing the work. *Sheard v. United States Fidelity & Guaranty Co.* 29

6. SAME—DAMAGES—EXTRA WORK. In an action upon a contractor's bond indemnifying against loss by reason of a breach of a building contract, there can be no recovery for extra work not embraced in the contract. *Sheard v. United States Fidelity & Guaranty Co.* 29

7. SAME — DEFENSES — FORMER ACTION—FINDINGS—CONCLUSIVENESS. An owner who is a party to lien foreclosure suits is precluded, in his subsequent action upon the contractor's bond, from asserting that findings in the lien suit were not within the issues and not binding upon him, in the absence of the record in that case. *Sheard v. United States Fidelity & Guaranty Co.* 29

8. SAME—DAMAGES—COSTS OF FORMER SUIT. In an action upon a contractor's bond indemnifying against loss by reason of a breach of the building contract, the plaintiff cannot recover the costs of defending lien foreclosures which were not taxed or legally taxable, nor for costs in resisting a claim established against him for extra work not covered in the contract. *Sheard v. United States Fidelity & Guaranty Co.* 29

9. INDEMNITY—DEATH OF PRINCIPAL—DEFAULTS OF PERSONAL REPRESENTATIVES. Where the obligations of a building contract survive, the surety on the contractor's indemnity bond is liable for defaults by the administrator after the contractor's death. *Macdonald v. O'Shea* 169

10. INDEMNITY — CLAIMS — EMPLOYMENT OF SUPERINTENDENT—EXECUTORS AND ADMINISTRATORS. Where the character and size of a building rendered the employment of a superintendent necessary after the contractor's death, his administrator may employ a superintendent whose claim would be a charge against the surety on the contractor's indemnity bond. *Macdonald v. O'Shea*..... 169

11. INDEMNITY—PAYMENT OF LIENABLE CLAIMS—REMEDIES OF INDEMNITOR. The surety on a contractor's indemnity bond, conditioned

INDEMNITY—CONTINUED.

for the performance of the contract and to protect the property against liens, may, after default, pay lienable claims that were about to be filed, before the time for their filing has expired, and recover therefor on security given by the contractor. *Macdonald v. O'Shea* 169

12. INDEMNITY—BONDS—DEFENSES—IMMATERIAL QUESTIONS. In an action on an indemnity bond guaranteeing a building contract, the failure to audit a claim for demurrage, as required by the contract, is immaterial where other valid claims exceeded the penalty of the bond. *Young Men's Christian Association v. Gibson*..... 307

INDIANS:

1. INDIANS—SALE OF INTOXICATING LIQUORS—POLICE POWER. Rem. & Bal. Code, § 6288, prohibiting the sale of intoxicating liquors to Indians, is a valid exercise of the police power, inherent in state sovereignty; and accordingly does not violate the fourteenth amendment to the Federal constitution in so far as it prohibits sale to Indians who are citizens; nor art. 1, § 8 of the constitution conferring authority on the general government to regulate commerce with Indian tribes, in so far as it prohibits sales to Indian wards of the United States. *State v. Mamlock* 631

INDICTMENT AND INFORMATION:

Guaranty of right to demand copy of charge, see CONSTITUTIONAL LAW, 1.

Offenses against laws against gambling, see GAMING, 2, 3.

1. INDICTMENT AND INFORMATION—REQUISITES—VERIFICATION. The verification of an indictment is sufficient when the jurat is signed by the deputy clerk as such. *State v. Clark* 128

INFANTS:

Rights, duties and liabilities of parents and children incident to the relation, see PARENT AND CHILD.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Appealibility of orders relating to injunction, see APPEAL AND ERROR, 5.

Setting up counterclaim in action for, see SET-OFF AND COUNTERCLAIM.

Interference with water rights, see WATERS AND WATER COURSES, 9.

INSOLVENCY:

As affecting right of appeal from orders denying injunctions, see APPEAL AND ERROR, 5.

INSPECTION:

Of corporate books and records by stockholders, see CORPORATIONS, 5, 6.

1. INSPECTION—GRAIN—STATUTES—CONSTRUCTION—TAX FOR INSPECTION. The grain inspection law, Rem. & Bal. Code, § 5980 *et seq.*, entitled an act for the regulation of public warehouses, relating to the shipping, grading and inspection of grain, and defining the duties of railroads, warehousemen, etc., was designed to protect the owner or shipper of grain from frauds practiced by public warehousemen, and is not broad enough to cover the inspection of grain shipped by an owner to himself, the same not being stored in a public warehouse. *Puget Sound Warehouse Co. v. Northern Pac. R. Co.* 322

2. SAME—CONSTITUTIONAL LAW—POLICE POWER. A tax for the inspection of grain shipped by the owner to himself cannot be sustained by reference to the police power, where the same was not to go through a public warehouse. *Puget Sound Warehouse Co. v. Northern Pac. R. Co.* 322

INSTRUCTIONS:

For assault, see ASSAULT AND BATTERY, 2.

Review as dependent on exception in lower court, see APPEAL AND ERROR, 12.

As part of record on appeal, see APPEAL AND ERROR, 17.

In criminal prosecutions, see CRIMINAL LAW, 4, 5, 9.

In civil actions, see TRIAL, 2.

INSURANCE:

Action against third party to recover loss paid on policy, see ACTION.

1. INSURANCE—LIFE INSURANCE—CONSTRUCTION OF APPLICATION. An application for insurance answering questions as to enumerated diseases, among them the question "Headaches—severe, protracted, or frequent," must be construed to mean headaches, severe, protracted, or frequent which were a disease, and the warranty of the answer "no" to such question only warrants that the insured had never had a disease of that character. *Hoeland v. Western Union Life Ins. Co.* 100

2. INSURANCE — INDEMNITY — APPLICATION — REPRESENTATIONS—FALSITY. An employer seeking indemnity or fidelity insurance fails to exercise the necessary reasonable care to ascertain the truth of statements made in the application that the employee's books balanced and were correct, where an examination of a part of the books disclosed more cash deposited than received, and an inspection would have disclosed the inaccuracy of the other books. *Poultry Producers' Union v. Williams* 64

3. SAME—REPRESENTATIONS — KNOWLEDGD OF FALSITY — EVIDENCE—SUFFICIENCY. Such a statement is known, or should have been known, to be false, where only the cash books and bank book were

INSURANCE—CONTINUED.

examined, and showed that more cash was deposited than had been taken in, and the cash and funds were not examined, and an inspection of all the books would have disclosed their inaccuracy and a misappropriation of cash or merchandise. *Poultry Producers' Union v. Williams* 64

4. SAME—WARRANTIES. An employer's statement, in an application for indemnity insurance that the books of the employee whose fidelity was to be insured were examined on a certain day and were found correct with funds on hand to balance, is a warranty of a material fact, the breach of which avoids the insurance policy. *Poultry Producers' Union v. Williams*..... 64

5. INSURANCE—LIFE INSURANCE—WARRANTIES. Representations in an application for life insurance relating to the applicant's health are warranties, and not expressions of opinion, where it is expressly stipulated in the application that they are warranted to be true; and a breach thereof avoids the policy, whether known to be false or not. *Hoeland v. Western Union Life Ins. Co*..... 100

6. INSURANCE—WARRANTIES—BURDEN OF PROOF. Where an applicant for insurance warrants that he had made true answers to questions propounded, the burden is upon him of alleging and proving the fact that his answers were not correctly written down; the medical examiner's certificate being only *prima facie* evidence of the fact. *Hoeland v. Western Union Life Ins. Co*..... 100

7. SAME—WARRANTIES—CONSTRUCTION. Warranties in an application for insurance are strictly construed. *Hoeland v. Western Union Life Ins. Co*..... 100

8. SAME—WARRANTIES—BREACH—EVIDENCE—SUFFICIENCY. There is no sufficient evidence to submit to the jury an issue as to breach of warranties that the insured had never consulted physicians, where it merely appeared that he had consulted a doctor to procure glasses, and on one occasion had received from a friend, a physician, a prescription for a headache; since the warranties in the policy related to diseases and not to mere temporary disorders. *Hoeland v. Western Union Life Ins. Co*..... 100

9. SAME—BREACH OF WARRANTY—HEADACHES. It cannot be said as a matter of law that headaches, severe, protracted, or frequent, are a disability or a disease so as to render an insurance policy void for misrepresenting matters material to the risk. *Hoeland v. Western Union Life Ins. Co*..... 100

10. SAME—BREACH OF WARRANTY—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether there was a breach of warranty in an application for insurance that the insured had never had severe, protracted headaches amounting to a disease, where the company submitted proof that the insured had, for several years before making the application, had frequent and severe headaches. *Hoeland v. Western Union Life Ins. Co*..... 100

INSURANCE—CONTINUED.

11. INSURANCE—ACCIDENT INSURANCE—PAYMENT OF PREMIUMS BY AGENT—DEATH OF ASSURED—TERMINATION OF AGENCY—FORFEITURE OF POLICY. The agency of a railroad company for its employee carrying accident insurance, for the purpose of paying the premiums out of earnings, is terminated by the death of the assured employee, so that an erroneous return by the company made after the death, representing that nothing was due the employee and that the policy had lapsed, is not binding upon the beneficiary and does not work a forfeiture of the policy. *Gilmore v. Continental Casualty Co.*. 203

12. SAME—PAYMENT OF INSTALLMENTS—POLICY—TIME FOR PAYMENT. An accident policy, insuring a railroad employee, the premiums to be by the railroad company deducted and promptly paid out of the assured's wages, and which fixes no specific time for the payment of the premiums, requires only that they be paid within a reasonable time; and a delay of three days after the end of the month is not unreasonable; nor would there be any default in payment of an installment where it was understood that the same was to be paid on pay day at the latter end of the succeeding month, and the assured was killed before pay day. *Gilmore v. Continental Casualty Co.*..... 203

INTENT:

Of Federal government to construct or operate Lake Washington Canal, see CANALS.

Remarriage and intent to evade laws, see DIVORCE, 4, 5.

INTERNATIONAL LAW:

See TREATIES.

INTERSTATE COMMERCE:

When injured employee engaged in, see MASTER AND SERVANT, 5, 6.

INTERVENTION:

By lessee of property condemned, see EMINENT DOMAIN, 8.

INTOXICATING LIQUORS:

Selling to Indians, see INDIANS.

1. INTOXICATING LIQUORS — LOCAL OPTION—STATUTES —CONFLICTING ACTS. The local option law of March 12, 1909 (Rem. & Bal. Code, § 6992), providing that the portion of each county outside of certain cities and towns shall be a unit and shall decide upon the question of the sale of intoxicating liquors, is in direct conflict with, and being the later enactment controls, the act of March 3, 1909 (Rem. & Bal. Code, §9339½), providing that each township in counties in which the township government has been adopted shall have the power to determine whether licenses for the sale of intoxicating liquors shall be issued therein. *Gunther v. Huneke*..... 494

INTOXICATING LIQUORS—CONTINUED.

2. SAME—STATUTES — APPLICATION—REPEALS—LEGISLATIVE POWER—RESTRICTING SUBSEQUENT ACTION. The local option law of 1909, being a general law applicable to all counties of the state, prevails over previous enactments, and applies to counties that had already adopted township government whereby a different system of regulation was provided, notwithstanding that an amendment to the township government act (passed previously at the same session of the legislature) provided that no act thereafter passed shall be construed as altering, amending or repealing any of its provisions; since repeals by implication cannot be prevented. *Gunther v. Huneke* 494

3. INTOXICATING LIQUORS—SALES—STATUTES—IMPLIED REPEAL. The pharmacy act, Rem. & Bal. Code, § 8459, relating to the drug business and authorizing the sale of spirituous liquors by druggists for medical purposes, does not impliedly repeal Rem. & Bal. Code, § 6275, relating to the sale and disposal of intoxicating loquors and requiring sales by druggists for medical purposes to be upon the written prescription of a reputable physician; since repeals by implication are not favored, and this rule has special application where the laws relate to different subjects. *State v. Krook*..... 23

4. INTOXICATING LIQUORS — SALES—LICENSES — DRUGGISTS—PRESCRIPTIONS. Rem. & Bal. Code, § 8459, amending the pharmacy law so as to provide that "no other license shall be necessary under any ordinance of any city" to make sales of intoxicating liquors under the pharmacy act, merely means that the state law shall govern, and was not intended to authorize sales without a state license and physician's prescription. *State v. Krook*..... 23

INVITATION:

To use private way, see NEGLIGENCE, 1-3.

JUDGES:

See JUSTICES OF THE PEACE.
Conduct of judge in criminal trial, see CRIMINAL LAW, 4, 5.

JUDGMENT:

Review in general, see APPEAL AND ERROR.
Appealability, see APPEAL AND ERROR, 1-6.
Appeal from order denying vacation, see APPEAL AND ERROR, 1.
On appeal, see APPEAL AND ERROR, 31.
Divorce proceedings, see DIVORCE.
Service by publication, see PROCESS.
In suits to quiet title, see QUIETING TITLE.
Sale of land for nonpayment of tax, see TAXATION, 2.
Notwithstanding verdict, see TRIAL, 1.
Judgment on special interrogatories and findings notwithstanding verdict, see TRIAL, 4, 5.

JUDGMENT—CONTINUED.

1. JUDGMENTS—VACATION—COURTS—TERMS. Under the Washington practice, the superior courts having no terms, their judgments have no probationary period in which they are subject to the control of the courts, except under the statutory right to vacation or modification. *State ex rel. McConihe v. Steiner*..... 578

2. JUDGMENTS—VACATION—PERSONS ENTITLED. The superior court has no power, on its own motion or at the instance of a stranger appearing as *amicus curiae*, to vacate a judgment for fraud and collision, there having been no real controversy between the parties. *State ex rel. McConihe v. Steiner*..... 578

3. JUDGMENT—COLLATERAL ATTACK—PAYMENT. It is not a collateral attack upon a judgment to show that a sale on execution thereunder was void because the judgment had been paid. *McLiesh v. Ball* 690

4. JUDGMENTS—CONCLUSIVENESS—PARTIES BOUND. Judgments fixing the rights of the parties to the action in the waters of a lake, although general in form, are binding only upon the parties and their privies. *State ex rel. McConihe v. Steiner*..... 578

5. JUDGMENT—RES JUDICATA—BAR. A judgment in an action by a vendor to cancel a land contract and forfeit the purchase money paid and quiet the vendor's title, in which the defense was presented that the contract was procured by fraud, is *res judicata* and a bar to a subsequent action brought by the vendee against the vendor to recover the purchase money; since the issue of plaintiff's right to recission for fraud was, or might have been, litigated in the former action. *Olson v. Title Trust Co*..... 599

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL QUESTION:

Taking or damaging private property, see EMINENT DOMAIN, 1.

JUDICIAL SALES:

On execution, see EXECUTION.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR.
Departments of superior courts, see COURTS.
Of court in divorce suits, see DIVORCE, 1-3.
Of court to vacate judgment, see JUDGMENT, 1, 2.
Necessity of summons for jurisdictional purposes, see PROCESS.
Of equity to restrain pollution of watercourse, see WATERS AND WATER COURSES, 9.

JURY:

Change in method of selecting jurors as ex post facto law, see CONSTITUTIONAL LAW, 2.
Custody and conduct, see CRIMINAL LAW, 6, 7.

JURY—CONTINUED.

Instructions in criminal prosecutions, see CRIMINAL LAW, 4, 5, 9.
Verdict in condemnation proceedings, see EMINENT DOMAIN, 12.
Submission of case to referee not denial of right to jury trial, see REFERENCE.
Instructions in civil actions, see TRIAL, 2.

1. JURORS—QUALIFICATIONS—NAME. A juror, described in the jury list and summoned as, and answering to the name of, Hall Horton, who was examined and accepted by both sides as satisfactory without either side asking his name, was qualified and competent, notwithstanding his name may have been Horton Hall. *State v. Newcomb* 414

2. JURORS—SELECTION—STATUTES—COURTS—COMMON LAW POWERS. Jurors selected in May, 1909, to serve during the next month, under the law in force at the time of their selection, may serve during such June term, although by the act of 1909, taking effect June 8, the former laws were repealed and a new method provided for selecting jurors for each ensuing month, leaving no law in force for the selection of jurors in June, 1909, in view of the constitutional authority of the superior courts and their common law power to provide juries. *Cathey v. Seattle Electric Co.* 176

3. JURORS—SELECTION—JURY OF COUNTY—DISTRICTS. Const., art. 1, § 22, guaranteeing to accussed the right to a trial before "a jury of the county," is not violated by Rem. & Bal. Code, § 94, which provides that the county shall be divided into jury districts, and that an equal number of the jurors shall be drawn from each district for service in any month. *State v. Nemcomb* 414

4. JURY—COMPETENCY—OPINIONS—PRESUMPTION OF INNOCENCE. A juror is not disqualified by the opinion that, when a homicide is admitted by the accused, it will be presumed that he was guilty of a crime until evidence of justification is submitted; and this does not conflict with the rule that the juror must, in proper cases, accord the accused the presumption of innocence. *State v. Ware*..... 526

JUSTICES OF THE PEACE:

Authority of county commissioners to employ baliffs or assistant clerks for, see COUNTIES.
Determining population for purpose of election, see MUNICIPAL CORPORATIONS, 12.

1. JUSTCES OF THE PEACE—NUMBER ELECTED—TENURE OF OFFICE—POPULATION OF CITY—DETERMINATION. Under Rem. & Bal. Code, § 6531, providing for two justices of the peace in cities and towns, as qualified by § 6532, which provides that at the general election in 1898, and bienially thereafter, in cities of more than 5,000 inhabitants, there shall be elected only one justice of the peace, two justices of the peace are to be elected in a city formerly having less than 5,000 inhabitants until it is officially determined that the city has more than that number; and such justices hold office until the

JUSTICES OF THE PEACE—CONTINUED.

next biennial election, although thereafter it was officially determined that at the time of their election the city had over 5,000 inhabitants. *State ex rel. Williams v. Brooks*..... 648

JUSTIFICATION:

Of homicide, see HOMICIDE, 3.

KNOWLEDGE:

Representations of officers as imputing knowledge of facts to corporation, see CORPORATIONS, 4.

Of representation in application for insurance, see INSURANCE, 3.

LACHES:

As bar to equitable relief in action by stockholder, see CORPORATONS, 2, 3.

Effect on equity, see EQUITY.

Vacation of tax deed, see TAXATION, 6.

LANDLORD AND TENANT:

Parol evidence to explain lease, see EVIDENCE, 7.

Compensation for injury to leasehold in property taken for public use, see EMINENT DOMAIN, 8, 16.

1. LANDLORD AND TENANT—LEASE—USE OF PREMISES—RESTRICTIONS. The statement in a lease of a storeroom that it was "for the purposes of conducting a bakery therein," is not a restriction which would prevent its use and occupation for the purpose of selling groceries; since the building was adapted thereto, and the use was not materially differnt from the bakery business. *Noon v. Mironski*... 453

LANDS:

See PUBLIC LANDS.

LEASES:

See LANDLORD AND TENANT.

LICENSES:

Validity of license tax on sale of goods by automatic device, see CONSTITUTIONAL LAW, 3.

Sale of intoxicating liquors, see INTOXICATING LIQUORS, 4.

Injuries to licensees, see NEGLIGENCE, 1, 2.

LIENS:

Liens of mechanics and materialmen, see MECHANICS' LIENS.

Tax lien, see TAXATION.

LIFE INSURANCE:

See INSURANCE.

LIMITATION:

Of rights sought and reduction of damages, see EMINENT DOMAIN, 2, 3.

Of action on contractor's bond, see INDEMNITY, 1, 2.

Contract as incurring debt exceeding legal limitation, see SCHOOLS AND SCHOOL DISTRICTS.

LIMITATIONS OF ACTIONS:

To enforce mechanic's lien, see MECHANICS' LIENS.

Remedies of mortgagee in collection of taxes paid, see TAXATION, 1.

1. LIMITATION OF ACTIONS—SUSPENSION—REVERSAL OF JUDGMENT—NEW SUIT. Rem. & Bal. Code, § 173, providing that, if judgment for plaintiff be reversed on appeal in an action commenced within time, the plaintiff may commence a new action, within one year after reversal, does not apply where no cause of action was stated or existed at the time the first action was commenced. *Ryno v. Snider*.... 457

LIVE STOCK:

Carriage of and liabilities, see CARRIERS, 1-4.

LOCAL OPTION:

Control and regulation of liquor traffic, see INTOXICATING LIQUORS, 1, 2.

LOCAL PREJUDICE:

As ground for change of venue in civil actions, see VENUE.

LOCATION:

Of boundary, see BOUNDARIES.

LOGS AND LOGGING:

Contract for carriage of logs, see CARRIERS, 11-18.

Obstruction of navigation by booms, see NAVIGABLE WATERS, 2.

Extension of time reserved for removal of timber, see VENDOR AND PURCHASER, 1, 2.

Enjoining logging company from polluting city water supply, see WATERS AND WATER COURSES, 9.

MACHINERY:

Sale of, see SALES, 4-7, 9, 10.

MAINTENANCE:

See CHAMPERTY AND MAINTENANCE.

MALPRACTICE:

Joint and several judgments in action for, see TRIAL, 4, 5.

MANSLAUGHTER:

See HOMICIDE, 1, 3.

MARRIAGE:

Marriage in one country after divorce in another, see DIVORCE, 4-6.
Relation of husband and wife, privileges and disabilities of coverture and separation by agreement, see HUSBAND AND WIFE.

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Review of error in admitting evidence of release of damages as dependent on prejudice, see APPEAL AND ERROR, 27.
Liability of carrier for ejection of passenger by servant, see CARRIERS, 8.
Statements of employee as part of res gestae, see EVIDENCE, 3.
Employer's indemnity insurance, see INSURANCE, 2-4.
Release of liability of master, see RELEASE.
Discharge of school teacher, see SCHOOLS AND SCHOOL DISTRICTS.

1. MASTER AND SERVANT—NEGLIGENCE—APPLIANCES—EVIDENCE—SUFFICIENCY. In an action for injuries to an employee engaged in loading a blast, negligence of the master in failing to furnish a suitable wooden rod to tamp the charge is not shown by evidence that such a rod was provided but broke, and that the employees then used an iron drill which caused an explosion, without calling upon the master for another suitable appliance. *Magnuson v. Chicago, Milwaukee & St. Paul R. Co.*..... 141

2. MASTER AND SERVANT—RAILROADS—DEFECTIVE ROADBED—EVIDENCE—SUFFICIENCY. A finding that a derailment was due to the defective condition of a railway roadbed is sustained, where there was competent evidence that the track was new, inferior ties had been used, the rails had not been spiked to all the ties, it was not properly surfaced or ballasted, and the train that was derailed was running at moderate speed. *Walters v. Spokane International R. Co.*..... 293

3. SAME—FELLOW SERVANTS—ASSISTANCE IN LOADING BLAST. Where plaintiff's foreman in charge of drilling two blasting holes about fifteen feet apart, desiring to load both holes at one time, called in a new man, by reason of his experience, to assist the plaintiff in loading one hole with the foreman and others loaded the other hole, the new man and the plaintiff are fellow servants, the former giving no orders or requests that might not be given by fellow servants; and the plaintiff assumes the risks of the other's negligence in using an iron drill in the process of loading. *Magnuson v. Chicago, Milwaukee & St. Paul R. Co.*..... 141

4. SAME—VICE PRINCIPALS—ACTS OF FOREMAN. The consent of a foreman to the use of an iron drill in the process of loading a blast does not render the master liable for negligent use of the drill, where the plaintiff's fellow servant was instructed as to the proper use of the drill, but made a mistake of judgment in using it. *Magnuson v. Chicago, Milwaukee & St. Paul R. Co.*..... 141

MASTER AND SERVANT—CONTINUED.

5. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—STATUTE—CONSTRUCTION. A common laborer engaged in loading a flat car with rails that had been used in repair work, who was injured through the negligence of co-employees in the same work, is not engaged in interstate commerce, within the meaning of the Employer's Liability Act, 35 Stats. 65, making common carriers by railroad while engaged in interstate commerce liable for injuries to employees resulting from the negligence of co-employees, it not being shown where the rails came from or were to go. *Tsmura v. Great Northern R. Co.*..... 316

6. SAME. To avail oneself of the benefit of such statute, the burden of proof is upon the plaintiff to show that his duties directly pertained to, and were a part of, interstate commerce. *Tsmura v. Great Northern R. Co*..... 316

7. MASTER AND SERVANT—FELLOW SERVANTS—SAFE PLACE—DEFECTIVE SCAFFOLD. Where it was customary for carpenters to construct such scaffolding as they and their co-employees needed in the progress of the work, and the master retained no supervision over the construction, and furnished suitable material and employed skillful workmen to put it up, the master is not liable to a fellow carpenter who was not present when the scaffold was erected, but who joined the crew later and fell by reason of insufficient material used in its construction; since the negligence was that of fellow servants. *Muehlman v. Spokane & Inland Empire R. Co*..... 327

8. MASTER AND SERVANT—ASSUMPTION OF RISKS—RELIANCE ON DIRECTIONS—UNLOADING HEAVY OBJECTS—QUESTION FOR JURY. A common laborer, assisting in unloading from a wagon a barrel of tar weighing five or six hundred pounds, without previous experience, or knowledge of the weight, may rely on the superior knowledge of the master and act as directed, and does not, as a matter of law, assume the risk of an injury from an unsafe method of unloading, whereby his hand was crushed because he was unable to bear the weight which bore upon him while acting as directed in lowering the barrel to the ground. *Forsman v. Seattle Electric Co*..... 666

9. MASTER AND SERVANT—INJURY TO SERVANT — FACTORY ACT — ACTIONS — CONDITION PRECEDENT — NOTICE OF ACCIDENT. Notice of an accident is a condition precedent to an action for personal injuries under Rem. & Bal. Code, § 6595, providing that no action shall be commenced for personal injuries under the factory act unless notice of the accident signed by the employee or some one in his behalf be given to the employer within six months from the time of the accident or within 90 days after recovery if mentally or physically unable to give the notice; and where the injured person became insane, a notice in his behalf signed by an unauthorized person, after the expiration of the six months, no general guardian having been appointed, is not such a notice as is required by the statute. *Nelson v. Young-Cole Lumber Co*..... 56

MASTER AND SERVANT—CONTINUED.

10. MASTER AND SERVANT—ACTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action by one representing himself as an experienced rip sawyer, to recover for injuries sustained by reason of a defect in the saw of which he had no notice, it is error for the court in instructing as to contributory negligence to make the same rest upon plaintiff's knowledge and experience in operating machines of the same kind, since his competency was not a matter in issue. *Wharton v. Tacoma Fir Door Co*..... 124

MATERIALITY:

Of alteration of written instrument, see ALTERATION OF INSTRUMENTS. 1.

MECHANICS' LIENS:

Bonds indemnifying against liens, see INDEMNITY.

1. MECHANICS' LIENS—FILING SECOND CLAIM—ACTION—LIMITATIONS—TIME TO SUE. Where a second notice of mechanics' lien is filed within the ninety days allowed by Rem. & Bal. Code, § 1134, for filing claims, for the purpose of correcting a supposed error in the first notice, the eight months allowed by Id., § 1138, for the commencement of an action to foreclose the lien begins to run from the date of filing the last notice; Id., § 1147, requiring a liberal construction of the lien laws, and there being no provision of law preventing the filing of successive liens within the ninety-day period. *Lindley v. McGlauflin*..... 636

MEDIUM OF PAYMENT:

See PAYMENT.

MENTAL ATTITUDE:

Opinion evidence as to feelings or mental attitude of people, see EVIDENCE, 9.

MISCONDUCT:

Of trial judge, see CRIMINAL LAW, 4, 5.
Of counsel in argument in criminal trial, see CRIMINAL LAW, 3.
Of counsel or party ground for new trial, see NEW TRIAL, 1.

MISREPRESENTATION:

By insured, see INSURANCE, 2-4.

MISTAKE:

Basis of claim for adverse possession, see ADVERSE POSSESSION, 3.

MONEY:

As medium of payment on breach of contract, see PAYMENT.

MONEY PAID:

Credit to vendee for money paid for land owned by third person, see VENDOR AND PURCHASER, 10.

MONEY RECEIVED:

Recovery of payment in general, see PAYMENT.

MONOPOLIES:

Grants of privileges or immunities, see CONSTITUTIONAL LAW, 3.

MORTGAGES:

Presentment of mortgage as claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 1.

Remedies of mortgagee in collection of taxes paid, see TAXATION, 1.

MOTIONS:

Presentation of objections for review, see APPEAL AND ERROR, 13.

MUNICIPAL CORPORATIONS:

Licensing sale of goods as unjust discrimination, see CONSTITUTIONAL LAW, 3.

Exercise of power of eminent domain, see EMINENT DOMAIN, 5-7, 9, 10, 14.

Population of city and election of justices, see JUSTICES OF THE PEACE.

Enjoining pollution of city water supply, see WATER AND WATER COURSES, 9.

1. MUNICIPAL CORPORATIONS—SPECIAL CHARTERS—LOCAL SELF-GOVERNMENT — PUBLIC PLANS COMMISSION — VALIDITY — MEMBERSHIP. The amendment to the city charter of Seattle creating a municipal plans commission, does not violate Const., art. 11, § 10, guaranteeing local self-government, in that part of the members of the commission are to be appointed by associations, clubs, and public service corporations some of which are nonresidents of the state and of the United States; since the commissioners are all required to be citizens of the city, and are appointive, not elective, officers, with only advisory powers, whose plans are to be submitted to a vote of the people, and no legislative authority is delegated to it. *Bussell v. Gill*..... 468

2. SAME—APPROVAL OF VOUCHERS—TAX. Such amendment is not objectionable by reason of conferring authority upon the commission to approve vouchers for all expenditures incurred, and requiring the comptroller to issue warrants to be paid out of the municipal plans commission fund, raised by a tax levy therefor. *Bussel v. Gill*.. 468

3. SAME—SPECIAL PRIVILEGES—CONSTITUTIONAL LAW. Such amendment does not violate Const., art. 1, § 12, providing that no law shall grant special privileges to any citizen or class if citizens, in that certain designated associations and corporations are granted the privilege of participating in the selection of the commission; since

MUNICIPAL CORPORATIONS—CONTINUED.

the right simply of recommendation is not such a right or privilege as comes within the prohibition of the constitution. *Bussell v. Gill* 468

4. MUNICIPAL CORPORATIONS — IMPROVEMENTS — POLICE POWER — EMINENT DOMAIN—FILLING LOW LANDS—DAMAGES—COMPENSATION. The act of 1909, empowering cities, in the exercise of the police power, to fill low lands, is not invalid or inconsistent in that it provides for compensation to the owners of buildings or improvements under the right of eminent domain; since the right of eminent domain and the police power rest in the control of the legislature and may be employed singly or together, and interested parties cannot object because compensated in any degree. *State ex rel. Stalding v. Aberdeen* 562

5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—FILLING LOW LANDS—POLICE POWER—HEALTH. A city may, by virtue of the police power, in a proper case, and when necessary to the public welfare, irrespective of the right of eminent domain, fill in low lands that are unsanitary and a menace to health, without rendering compensation for damages claimed to private property filled in; and under Rem. & Bal. Code, § 7975, may assess the property to pay the cost of the work, providing the exercise of the power is not unjust or arbitrary. *Bowes v. Aberdeen* 535

6. SAME—NECESSITY FOR IMPROVEMENT—EVIDENCE—SUFFICIENCY. A necessity exists, authorizing the exercise of the police power by a city for the purpose of filling low lands, and the improvement is not disproportionate to the danger, where it appears that an area covering one thousand city lots, within or adjacent to the business portion of a city where permanent streets are necessary, are so low and covered with stagnant water as to be unsanitary and a serious menace to the health of the city, and that the danger can be removed by filling in the land, and by no other practical or economical method. *Bowes v. Aberdeen* 535

7. SAME—DETERMINATION—JUDICIAL QUESTION. Whether the facts warrant the exercise of the police power for the purpose of filling low lands in a city is a judicial question to be resolved by the courts. *Bowes v. Aberdeen* 535

8. SAME—STATUTES—TITLE AND SUBJECT OF ACT. The title of the act of 1909, empowering cities "to fill low land . . . and for that purpose to exercise the right of eminent domain for the taking or damaging of property" is sufficiently broad to authorize the filling of low lands under the police power as a sanitary measure without making compensation for damages claimed to the property filled in; since the reference to the right of eminent domain applies to property taken or destroyed and not to land filled in, and the power "to fill" includes the right to exercise the police power. *Bowes v. Aberdeen* 535

MUNICIPAL CORPORATIONS—CONTINUED.

9. SAME — SPECIAL ASSESSMENTS — ACCORDING TO AREA — VALIDITY. An assessment upon the property to pay for the cost of filling low land "in proportion to the surface area", as authorized by Rem. & Bal. Code, § 7975, is not unreasonable or arbitrary, because not made according to benefits or in proportion to the value of the property; nor is the same void as authorizing unequal taxation, in violation of the constitution requiring property to be taxed according to its value, as that clause of the constitution does not apply to special assessments. *Bowes v. Aberdeen* 535

10. SAME—ASSESSMENTS—DAMAGES. In proceedings by a city to fill low lands, the damages and expenses paid by the city in condemnation suits may be added to the cost of the improvement and assessed against the property in the district. *State ex rel. Stalding v. Aberdeen* 562

11. SAME — CONSTITUTIONAL LAW—DUE PROCESS—STATUTES. The act of 1909 empowering a city to fill low lands and assess the cost upon the lands filled in in proportion to the surface area, is not a deprivation of property without due process; since it provides for notice and a hearing and authorizes the board to make alterations and modifications in the assessment as justice and equity may require. *Bowes v. Aberdeen* 535

12. MUNICIPAL CORPORATIONS — POPULATION — DETERMINATION — EVIDENCE—JUSTICES OF THE PEACE. It not being the duty of the Bureau of Statistics to enumerate the inhabitants of the state or its cities, its biennial report containing estimates of the population of the cities, with other general information, is not an official determination of the population of a city for the purpose of determining the number of justices of the peace to be elected therein. *State ex rel. Williams v. Brooks* 648

MUTUALITY:

Of contract to transport logs, see CARRIERS, 12.
Agreement for release of damages, see RELEASE, 3.

NAMES:

Of juror as affecting competency, see JURY, 1.
Filing certificate showing business name, see PARTNERSHIP, 1.

NAVIGABLE WATERS:

Canals for navigation, see CANALS.
Disposal of state tide lands, see PUBLIC LANDS.
Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

1. NAVIGABLE WATERS—NAVIGABILITY—FEDERAL STATUTES. A stream is not navigable in the Federal sense, within 26 Stat. 454, § 10, prohibiting an obstruction to the navigable capacity of waters over which the United States has jurisdiction, where it was only navigable

NAVIGABLE WATERS—CONTINUED.

in a restricted sense for a distance of three or four miles at high tide for small boats drawing three or four feet of water. *State ex rel. Pealer v. Superior Court*..... 565

2. NAVIGABLE WATERS — OBSTRUCTION — LOGS AND LOGGING—BOOMS—NUISANCES—EMINENT DOMAIN. Rem. & Bal. Code, § 7122, granting boom and driving companies the right to construct booms and splash dams for the driving of logs and timber products, under the right of eminent domain, provided that the "outlet" of the stream is not obstructed, by necessary implication gives the right to obstruct restricted navigation in small streams at times, where such use is necessarily an exclusive one; and such obstruction would not fall within the general statutes defining nuisances, or be a valid objection to eminent domain proceedings to condemn the right to overflow lands. *State ex rel. Pealer v. Superior Court*..... 565

NAVIGATION:

See NAVIGABLE WATERS.

NEGLIGENCE:

Of carriers in carriage of live stock, see CARRIERS, 1-4.
Inadequate and excessive damages, see DAMAGES, 4.
Acts and statements accompanying or connected with transaction as constituting part of *res gestae*, see EVIDENCE, 3.
Contributory negligence of boy injured by explosion of dynamite, see EXPLOSIVES, 3.
Injuries from accidental explosions, see EXPLOSIVES, 1, 2.
Of employers, see MASTER AND SERVANT.
In operation of trains, see RAILROADS, 1.
Accidents at railroad crossings, see RAILROADS, 2.
Fire caused by operation of railroad, see RAILROADS, 3.
In operation of street railroads, see STREET RAILROADS.
Of county officer preventing payment of taxes, see TAXATION, 5.

1. NEGLIGENCE—WAYS—INVITATION—LICENSEE—PLEADING. An allegation that a road was a private road and way of necessity, constantly traveled over by the public generally, has the effect to charge that it was a public way over private land, and use thereof by the public for some years amounts to an implied invitation to the public to use it, so that one using it would not be a mere licensee. *Hanson v. Spokane Valley Land and Water Co*..... 6

2. SAME—WAYS—PERSONS LIABLE—EXCAVATIONS. A water company making an excavation across a public way on private land, is liable for consequent injuries to a traveler impliedly invited to use the road, although the company was not the owner of the land. *Hanson v. Spokane Valley Land and Water Co*..... 6

NEGLIGENCE—CONTINUED.

3. SAME—WAYS—INVITATION. A well-defined private way connecting with the main traveled road, left open to and much traveled by the public, amounts to an implied invitation to the public to use it. *Hanson v. Spokane Valley Land & Water Co*..... 6

4. SAME—WAYS—NEGLIGENCE. It is negligence to dig a ditch across a public road on private land, and leave the same unguarded at night. *Hanson v. Spokane Land & Water Co*..... 6

5. NEGLIGENCE — IMPUTED NEGLIGENCE — DRIVER OF VEHICLE. In an action for injuries received by one riding with the driver of an ice wagon, in collision with a street car, it is proper to instruct that the plaintiff may recover notwithstanding negligence on the part of the driver of the team, if the plaintiff did not cause and was not responsible for such negligence, had no control over the driver, and was not guilty of negligence himself. *Cathey v. Seattle Elec. Co*.... 176

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

See NEW TRIAL, 2.

NEWSPAPERS:

Service of process by publication, see PROCESS.

NEW TRIAL:

Necessity for motion for purpose of review, see APPEAL AND ERROR, 13. Remand by appellate court for new trial, see APPEAL AND ERROR, 31. On retrial after refusal of nonsuit, see TRIAL, 1.

1. NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION. It is not an abuse of discretion to refuse a new trial, asked because of a conversation held by respondent's counsel with a juryman, in a public place, in the presence of appellant's counsel, no reference to the case being made in the conversation. *Deighton v. Hover*..... 12

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly refused where the new evidence merely affected the credibility and weight of the evidence of witnesses who had given conflicting evidence upon a former trial of the action, such previous testimony having been shown on the last trial. *Olson v. Gill Home Investment Co*..... 151

NOTARIES:

Notary's fees as costs, see COSTS, 1.

NOTES:

Materiality of alteration of note, see ALTERATION OF INSTRUMENTS. Promissory notes, see BILLS AND NOTES.

NOTICE:

Judicial notice, see EVIDENCE, 1.
Of injury under factory act law, see MASTER AND SERVANT, 9.
Of lien claim, see MECHANICS' LIENS.
Default fixing liability of surety, see PRINCIPAL AND SURETY, 6, 7.
Record of executory contract for sale of land, see VENDOR AND PURCHASER, 6.
Affecting *bona fides* of purchaser of land, see VENDOR AND PURCHASER, 7, 8.
Actual notice of contract of sale, see VENDOR AND PURCHASER, 9.

NUISANCE:

Obstructions in navigable stream, see NAVITABLE WATERS, 2.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 12, 13.
To defect of parties, see PARTIES.

OBSTRUCTIONS:

Of navigation, see NAVIGABLE WATERS.

OFFICERS:

Representations as binding on corporations, see CORPORATIONS, 4.
Authority of Commissioners to employ bailiffs or clerks for justices of the peace, see COUNTIES.
Justices of the peace, see JUSTICES OF THE PEACE.
Municipal plans commission, see MUNICIPAL CORPORATIONS, 1-3.

OFFSET:

See SET-OFF AND COUNTERCLAIM.

OPINIONS:

In civil actions, see EVIDENCE, 8, 14.
As disqualifying juror, see JURY, 4.

ORAL EVIDENCE:

See EVIDENCE, 5-7.

ORDERS:

Review of appealable orders, see APPEAL AND ERROR, 1-6.
Review by certiorari, see CERTIORARI.

PARENT AND CHILD:

1. PARENT AND CHILD—CUSTODY OF CHILD—RIGHT OF PARENT—EVIDENCE—SUFFICIENCY. The paramount right of the parent to the custody of his child being subject only to the welfare of the child, a father cannot be deprived of the custody of a son, ten years of age, where it appears that he is a fit person, earning $100 to $150 a month for the support of a family of six children, who are properly

PARENT AND CHILD—CONTINUED.

clothed, regularly attending school, and required to assist in ordinary work about the house; and the fact that their stepmother is strict in disciplining the children does not warrant awarding the custody to another. *State ex rel. Collier v. Bell* 575

PAROL AGREEMENTS:

To pay additional sum on abandonment of contract, see CONTRACTS, 4.

PAROL EVIDENCE:

See EVIDENCE, 5-7.

Oral agreement releasing liability on note, see BILLS AND NOTES, 2, 3.

Parol evidence of custom as varying written acceptance on sale of goods, see CUSTOMS AND USAGES.

PARTIES:

Curing defect of parties plaintiff, see ACTION.

Persons entitled to appeal, see APPEAL AND ERROR, 7-9.

To contracts in general, see CONTRACTS, 5.

Rights and liabilities as to costs, see COSTS, 2.

Capacity to execute deed, see DEEDS, 1.

Condemnation proceedings, see EMINENT DOMAIN, 8, 10.

Concluded by judgment, see JUDGMENT, 4.

To vacate judgment, see JUDGMENT, 2.

Release of party to contract as discharge of surety, see PRINCIPAL AND SURETY, 1.

Entitled to specific performance, see SPECIFIC PERFORMANCE.

1. PARTIES—DEFECT OF PARTIES—OBJECTION—DEMURRER. In an action by a widow for the death of her husband, error cannot be predicated upon the overruling of a general demurrer for want of sufficient facts, on the theory that it did not appear that she was the sole party in interest under Rem. & Bal. Code, § 183, authorizing an action by the widow and children of the deceased; inasmuch as, under Id., §§ 259, 261, the objection to defect of parties must be by special demurrer or answer. *Buckles v. Reynolds* 485

PARTNERSHIP:

Account stated between partners, see ACCOUNT STATED.

Partner suing for performance of contract, see SPECIFIC PERFORMANCE, 2.

Competency of former partner to testify to transactions with deceased, see WITNESSES, 1.

1. PARTNERSHIP—BUSINESS NAME—STATUTORY PROVISIONS—RIGHT TO SUE. Partners may maintain an action upon a contract entered into by them as individuals without having complied with Rem. & Bal. Code, § 8369, requiring the filing of a certificate showing their assumed business name and the names of the members of the firm, where before suit brought they filed the required certificate showing

PARTNERSHIP—CONTINUED.

that they were then doing business under the assumed name by which they sued, and that they were the only members of the firm. *Church v. Wilkeson-Tripp Co* 262

2. PARTNERSHIP—ACCOUNTING—EVIDENCE—SUFFICIENCY. The books of a partnership are insufficient to show a balance due one partner, where unexplained they are so far incomplete as to fail to show the terms of the partnership or its status at the time of the dissolution, and there is no competent evidence to explain them. Shaw v. *Lobe* 219

PAYMENT:

Voluntary payment as cause of action, see ACTION.
Fare on street car, see CARRIERS, 5-10.
Subscriptions for stock, see CORPORATIONS, 1.
Of execution debt, see EXECUTION.
Of claims by indemnitor, see INDEMNITY, 11.
Sufficiency of payment of premium to prevent forfeiture of insurance, see INSURANCE, 11, 12.
Showing of payment and void sale on execution as collateral attack, see JUDGMENT, 3.
To principal as releasing surety, see PRINCIPAL AND SURETY, 2, 3.
Effect of partial payment and acceptance on vendor's right to recover balance of price, see SALES, 5.
Excuse for failure to pay taxes, see TAXATION, 5.
Defect in title and credit for sum paid for such part, see VENDOR AND PURCHASER, 10.

1. PAYMENT — MEDIUM — CONTRACTS—BREACH. Under a promise "to do what is right," for the use of a mare, the medium of payment is money where no other is expressed, and a money compensation will be awarded for breach of the contract. *Van de Vanter v. Redelsheimer* 38

PERFORMANCE:

Necessity of performance of contract by vendor, see SALES, 8.
Of contract by vendor in action for price, see VENDOR AND PURCHASER, 3.

PERSONAL INJURIES:

See ASSAULT AND BATTERY; NEGLIGENCE.
Items of damages recoverable in action for assault, see DAMAGES, 1, 2.
Inadequate and excessive damages, see DAMAGES, 4.
From explosions, see EXPLOSIVES.
To employee, see MASTER AND SERVANT.
To persons on railroad trains, see RAILROADS, 1.
To person on or near railroad tracks, see RAILROADS, 2.
Release of claim for damages, see RELEASE.
To persons on or near street railroad tracks, see STREET RAILROADS.

PHYSICIANS AND SURGEONS:

Joint and several judgment against physician and hospital association for malpractice, see TRIAL, 4, 5.
Impeachment of medical expert, see WITNESSES, 5.

PLACE:

Construction of contract of sale as to place of delivery, see SALES, 1.

PLEADING:

Appealability of order on demurrer, see APPEAL AND ERROR, 1, 6.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 26, 27.
On bills or notes, see BILLS AND NOTES, 4.
In action by broker, see BROKERS.
For ejection of passenger, see CARRIERS, 6.
In condemnation proceedings, see EMINENT DOMAIN, 8, 11.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
Actions for negligence, see NEGLIGENCE, 1.
Mode of objection for defects as to parties, see PARTIES.
In suits to quiet title, see QUIETING TITLE.

POLICE POWER:

Sale of intoxicating liquors to Indians, see INDIANS.
Tax for inspection of grain shipped, see INSPECTION.
Of municipality, see MUNICIPAL CORPORATIONS, 4-8.

POLICY:

Of insurance, see INSURANCE.

POLLUTION:

Enjoining pollution of water courses, see WATERS AND WATER COURSES, 9.

POPULATION:

Determination of and election of justices, see JUSTICES OF THE PEACE.
Enumerating for purpose of determining number of justices of the peace, see MUNICIPAL CORPORATIONS, 12.

POSSESSION:

See ADVERSE POSSESSION.
Of deed as presumption of delivery, see DEEDS, 2.
Of land as notice affecting bona fides of purchase, see VENDOR AND PURCHASER, 9.

PRACTICE:

See APPEAL AND ERROR; CERTIORARI; COSTS; CRIMINAL LAW; JUDGMENT; NEW TRIAL; PARTIES; REFERENCE; TRIAL.
Prosecution of actions in general, see ACTION.
Condemnation proceedings, see EMINENT DOMAIN.

PREFERENCES:

Right to purchase tide or shore land, see PUBLIC LANDS.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 26-30.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 9.
Showing of local prejudice, see VENUE.

PREMIUMS:

Payment of insurance premiums, see INSURANCE, 11, 12.

PRESCRIPTION:

See WATERS AND WATER COURSES, 8.

PRESUMPTION:

In civil actions, see EVIDENCE, 2.
Of murder in second degree, see HOMICIDE, 3.
As to bona fides on conveyance between husband and wife, see HUSBAND AND WIFE, 1.

PRICE:

Authority of agent to fix price, see PRINCIPAL AND AGENT, 1.

PRINCIPAL AND AGENT:

See BROKERS.
Liability of carrier for acts of employees in ejecting passengers, see CARRIERS, 8.
Admissions by agent as evidence, see EVIDENCE, 4.
Payment of execution debt to agent, see EXECUTION.
Wrongful act of husband as creating community debt, see HUSBAND AND WIFE, 4.
Death of insured as terminating agency for purpose of paying premiums, see INSURANCE, 11.
Right of agent in confidential relation to enforcement of contract, see SPECIFIC PERFORMANCE, 4.

1. PRINCIPAL AND AGENT—AUTHORITY—SALE—APPARENT AUTHORITY TO FIX PRICE. Where the owner of a horse intrusted it to an agent to take to a place one hundred miles distant, where he had exclusive possession of the horse and certificates of its registration for six or eight weeks, for the purpose of selling it and making delivery to any purchaser he might find, it is a question for the jury to determine whether the agent was clothed with apparent authority to agree upon

PRINCIPAL AND AGENT—CONTINUED.

the price; and the fact that he first asked $3,000 and sold it for $1,000, is not sufficient to suggest to the purchasers that he was exceeding his authority. *Galbraith v. Weber*..... 132

2. SAME—APPARENT AUTHORITY TO TAKE NOTES. Where an agent was orally authorized to sell a horse in his possession, and take notes in payment, without any special instructions as to the form of the notes, it is for the jury to determine whether he had apparent authority to take notes payable to himself. *Galbraith v. Weber*. 132

PRINCIPAL AND SURETY:

See INDEMNITY.

Costs allowed for surety bond on appeal, see COSTS, 6.

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—BUILDING CONTRACTS—RELEASE OF PARTY TO CONTRACT. Where a firm of building contractors dissolved partnership before completion of a building, the owner did not release the retiring partner, or acquiesce in his release by the copartner, by merely writing a letter and making a payment individually to the copartner without mention of the firm, in the absence of any intent to do so; and therefore the surety on the building contract would not be discharged from liability by reason of the release of one of the parties. *Young Men's Christian Association v. Gibson*..... 307

2. SAME—DISCHARGE OF SURETY—SUPERINTENDENT'S ESTIMATES—PARTIAL PAYMENTS. Where the superintendent of construction, as representative of the owner, is by the contract made the agent of all parties for the purpose of making estimates and certificates for partial payments as the work progressed, payment by the owner in good faith of estimates that were too high will not discharge the surety on the building contract, although the superintendent did not properly discharge his duties and the certificates might not have been sufficient to bind the owner; since the estimates were not final or intended to be absolutely correct. *Young Men's Christian Association v. Gibson*..... 307

3. SAME—DISCHARGE OF SURETY—PAYMENTS—CONTRACT—FILING OF RECEIPTS—"SUBCONTRACTOR." A surety on a building contract is not discharged by the owner's making partial payments without requiring the contractors to file recepits showing that all claims for labor and material for the previous month were paid, where the contract only required the contractors to file receipts showing that all *subcontractors* had been paid in full to the amount of the estimates; as "subcontractor" is used in its technical sense and does not include laborers or materialmen. *Young Men's Christian Association v. Gibson* 307

4. SAME—DISCHARGE OF SURETY—CONTRACT—CONDITIONS—WAIVER. A provision in a building contract that the superintendent shall audit and certify to the cost of completing the building after abandonment

PRINCIPAL AND SURETY—CONTINUED.

by the contractors does not apply, so as to work a discharge of the surety if not complied with, where the surety waived its right to complete the building on condition that the contract for completing it be let to the lowest of three bidders who should give a bond for the faithful performance of the special contract. *Young Men's Christian Association v. Gibson* 307

5. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—RESPONSIBILITY OF PRINCIPAL. A surety company that guaranteed the faithful performance of a contract by a copartnership that had undertaken contracts to the amount of $200,000 on a capital of $400, cannot escape liability because the owner let the contract to such a partnership. *Young Men's Christian Association v. Gibson* 307

6. PRINCIPAL AND SURETY—BUILDING CONTRACTS—CONTRACTOR'S DEFAULTS—BONDS. Deviations from a contract in minor details and mistakes of the contractor, which are corrected on calling his attention thereto, do not constitute defaults, within the meaning of a building contract requiring written notice of default to be given to the surety on the contractor's bond, no loss having been sustained by the owner. *Lazelle v. Empire State Surety Co.* 589

7. SAME—NOTICE OF BREACH OF CONTRACT—NECESSITY. The surety on a contractor's bond cannot complain of failure to give written notice of defaults by the contractor, within the time required by the contract, where no loss or substantial damage resulted therefrom, and notice was given in ample time to enable the surety to protect itself. *Lazelle v. Empire State Surety Co.* 589

8. SAME—EVIDENCE OF DAMAGE—CERTIFICATE BY ARCHITECT. The architect's certificate of the cost to the owners of completing a building after the contractor's default is admissible to prove the damage, in an action against the contractor's surety, where the building contractor stipulated that the architect should audit the cost and that his certificate should be conclusive. *Lazelle v. Empire State Surety Co.* 589

PRINTING:

Findings and conclusions in briefs, see APPEAL AND ERROR, 19.

PRIVILEGES:

Of married women, see HUSBAND AND WIFE, 3.

PROBATE:

Of will, see WILLS.

PROCESS:

Appealibility of order quashing summons, see APPEAL AND ERROR, 2.
Inquiry as to legality of on habeas corpus, see HABEAS CORPUS.
Published summons in foreclosure suit, see TAXATION, 2.

PROCESS—CONTINUED.

1. PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Rem. & Bal. Code, § 9254, subd. 2, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Pillsbury v. Beresford* 656

2. SAME—JUDGMENT—SERVICE OF PROCESS—EVIDENCE. In an action to set aside a default judgment in a tax foreclosure, a finding that there was no other summons than a defective publication shown by the files is warranted where the defendants in the foreclosure were nonresidents, did not enter any appearance, or know of the action and were not personally served, the files show no other service than the defective publication, and there was no affirmative showing that any other service was made. *Pillsbury v. Beresford* 656

PROFITS:

Loss of profits as element of damages, see DAMAGES, 2, 3.
Opinion evidence as to earnings by brokers, see EVIDENCE, 8.
Of wife on sale of contract to purchase land as separate property, see HUSBAND AND WIFE, 3.

PROHIBITION:

To prevent amendment of divorce decree, see DIVORCE, 3.

PROMISSORY NOTES:

See BILLS AND NOTES.
Materiality of alteration, see ALTERATION OF INSTRUMENTS.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.
Taking for public use, see EMINENT DOMAIN.
Disposal and succession to property by aliens, see TREATIES.

PROXIMATE CAUSE:

Direct or remote consequences of injury, see DAMAGES, 1.
Of injury from explosion of dynamite, see EXPLOSIVES, 2.

PUBLICATION:

Service of process, see PROCESS.
Summons in foreclosure of tax lien, see TAXATION, 2.

PUBLIC LANDS:

Deed between husband and wife as conveying preference right to purchase, see HUSBAND AND WIFE, 2.
Appropriation of water rights, see WATERS AND WATER COURSES, 2.

PUBLIC LANDS—CONTINUED.

1. PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE. The grantee of lots below the line of ordinary high water on a navigable lake acquires no title thereto and has no preference right to purchase shore lands as an owner of abutting upland. *Shorett v. Signor* 89

2. SAME—STATUTES—ABUTTING OWNERS. Under Rem. & Bal. Code, § 6754, the *bona fide* purchaser of lots below high water mark, from the owner of the uplands, or one claiming through such *bona fide* purchaser, is entitled to the preference right to purchase the shore lands, regardless of the present ownership of the abutting uplands. *Shorett v. Signor* 89

3. SAME—PURCHASE FROM STATE—PROCEEDINGS—APPEAL—AMENDMENT OF APPLICATION. Under Rem. & Bal. Code, § 6620, relating to appeals to the superior court on applications to purchase shore lands, it is proper to allow an application, based upon the ownership of lots below high water mark, to be amended so as to show that the applicant had acquired the record title thereto through a *bona fide* purchaser from the owner of the upland, Rem. & Bal. Code, §6754, providing that such *bona fide* purchaser or persons claiming under him shall have the preference right to purchase the shore lands. *Shorett v. Signor* 89

PUBLIC POLICY:

Validity of contract of carrier limiting liability for loss of cattle shipped, see CARRIERS, 1, 2.
Validity of contract of carriers limiting liability, see CARRIERS, 15, 18.

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

QUALIFICATIONS:

Of juror, see JURY, 1.

QUESTION FOR JURY:

In action for injuries from explosion of dynamite, see EXPLOSIVES, 2, 3.
Breach of warranty in application for insurance, see INSURANCE, 10.
Assumption of risk by injured servant, see MASTER AND SERVANT, 8.
Authority of agent, see PRINCIPAL AND AGENT.
Negligence of motorman in collision with street car, see STREET RAILROADS.

QUIETING TITLE:

1. QUIETING TITLE—EJECTMENT—PLEADING—DEFENSES. Under Rem. & Bal. Code, § 785, providing that, in actions to recover the possession of land, the parties shall set forth their title, and that the superior title, whether legal or equitable, shall prevail, the court is to determine the title and grant relief, according to the equities of the case; and defendants in possession, claiming that plaintiffs' execution sale was void on the ground that the judgment had been paid, need not first institute a direct proceeding to cancel the judgment before answering the complaint. *McLiesh v. Ball* 690

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Ejection of passengers and intruders, see CARRIERS, 5-10.
Requiring construction and operation of spur track as taking of property without due process of law, see CONSTITUTIONAL LAW, 4.
Condemnation of right of way for other public use, see EMINENT DOMAIN, 3, 8, 11, 15, 16.
Injuries to employees, see MASTER AND SERVANT, 2, 5, 6.
Injuries to persons on or near street railway tracks, see STREET RAILROADS.

1. RAILROADS—DEFECTIVE TRACK— EVIDENCE— ADMISSIBILITY—TRIAL. Upon an issue as to the defective condition of a new railroad track and roadbed which caused the derailment of a train, it is not error to exclude evidence offered by the railroad company to show that the same was in as good condition as is customary with roads of like age, where great latitude was allowed in receiving evidence of experienced men as to all the details of proper construction and condition of new tracks. *Walters v. Spokane International R. Co.* 293

2. RAILROADS— CROSSINGS — DEFFCTS— DEATH — CAUSE —EVIDENCE— SUFFICIENCY. The evidence is insufficient to show that the death of a drayman, who fell from his wagon and was killed while driving across a railroad track, was due to defective crossing, because too narrow and the rails too high and liable to cause the wagon to slew to one side when crossing at an angle, where it appears that the crossing was fourteen feet wide, that there was no occasion for the drayman to drive across at an angle, and that he had attempted to cross the track a few feet east of the crossing prepared by the railroad company; there being no liability where one negligently turns aside from a crossing prepared and uses another way. *Moore v. Great Northern R. Co.* 1

3. RAILROADS—NEGLIGENCE—FIRES—EVIDENCE—SUFFICIENCY. Whether a fire was negligently set by a railroad company is for the jury, where there was testimony that it was customary to clean ashes and cinders from locomotives on its main line and leave the same on the ties a few feet from a depot platform, that the cross ties had been frequently set afire, that the wind was blowing towards the platform, and the fire was first discovered on the platform a few

RAILROADS—CONTINUED.

feet from the ties; and it is immaterial that defendant's witnesses testified that no engines were cleaned there that day or night and that engines were not cleaned at that station; the credibility of the witnesses being for the jury. *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.* 332

REAL PROPERTY:

Conveyance, see VENDOR AND PURCHASER.

RECEIPTS:

Filing by contractors on payment of claims, see PRINCIPAL AND SURETY, 3.

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 12-18; CRIMINAL LAW, 4, 8.

Judicial notice of custom in recording instruments, see EVIDENCE, 1.

Conditional sale contract, see SALES, 15.

Recording executory contract for sale of land, see VENDOR AND PURCHASER, 6.

As notice affecting bona fides of purchase of land, see VENDOR AND PURCHASER, 8, 9.

REFERENCE:

1. REFERENCE—ACCOUNTING—JURY TRIAL. Where a case involves a long and complicated account, it may be sent to a referee to return the facts without there being any denial of the right to jury trial. *Poultry Producers' Union v. Williams* 64

RELEASE:

Review of ruling on evidence of as dependent on prejudicial error, see APPEAL AND ERROR, 27.

Of liability against maker of note, see BILLS AND NOTES, 3.

Liability on insurance policy, see INSURANCE, 4, 5, 9, 10-12.

Liability as surety, see PRINCIPAL AND SURETY, 1-5.

1. RELEASE—EXECUTION—VALIDITY. A release of damages given by an injured servant in consideration of reemployment is binding upon the servant although not signed by the employer, where the contract was executed by reinstating and continuing him in employment for more than six months. *Tindall v. Northern Pac. R. Co.*. 118

2. RELEASE—CONSIDERATION—SUFFICIENCY. A release of damages, advisedly signed by an injured servant as a condition precedent to, and for the purpose of securing, reemployment, is given upon sufficient consideration, and is binding in the absence of fraud, although no definite time of service was agreed upon. *Tindall v. Northern Pac. R. Co.* 118

RELEASE—CONTINUED.

3. RELEASE—MUTUALITY. Such an agreement is not void for want of mutuality because the reemployment was not for a definite time, where the company agreed to allow the employee to work "under the same circumstances as before the accident." *Tindall v. Northern Pac. R. Co.* 118

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 31.

REMOTE DAMAGES:

See DAMAGES, 2.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

RENUNCIATION:

Of rights against maker of note, see BILLS AND NOTES, 3.

REPEAL:

Of criminal statutes and effect of savings clause, see CRIMINAL LAW, 1, 2.

Of statutes, see STATUTES; INTOXICATING LIQUORS.

REPUTATION:

Impeaching reputation of medical expert for truth and veracity, see WITNESSES, 5.

REQUESTS:

Necessity for requests to review instructions, see APPEAL AND ERROR, 10, 11.

For instructions in civil actions, see TRIAL, 2.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract, see CONTRACTS, 4.

Of contract for sale of land, see VENDOR AND PURCHASER, 4.

RES GESTAE:

In civil actions, see EVIDENCE, 3.

RESIDENCE:

For purpose of divorce, see DIVORCE, 4-6.

RES JUDICATA:

See JUDGMENT, 4, 5.

RESTRICTIONS:

As to use of property condemned, see EMINENT DOMAIN, 2.

In lease as to use of premises, see LANDLORD AND TENANT.

REVENUE:

See TAXATION.

REVIEW:

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR.
Statutory writ of review, see CERTIORARI.
In criminal prosecution, see CRIMINAL LAW, 4, 8, 9.
Condemnation proceedings, see EMINENT DOMAIN, 15, 16.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 1-3.
Restricting use condemned so as to permit exercise of riparian rights, see EMINENT DOMAIN, 2.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 8.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 7.

SALES:

Validity of license tax on sale of goods by automatic device, see CONSTITUTIONAL LAW, 3.
Construction of contract for sale of goods, see CONTRACTS, 1, 2.
Parole evidence of custom, see CUSTOMS AND USAGES.
Estoppel to question execution sale, see ESTOPPEL.
Parole evidence to explain contract of sale, see EVIDENCE, 5-6.
On execution, see EXECUTION.
Of liquor to Indians, see INDIANS.
Of intoxicating liquors, see INTOXICATING LIQUORS.
Implied authority of agent as to sales, see PRINCIPAL AND AGENT.
Purchasing shore lands from state, see PUBLIC LANDS.
Of real property, see VENDOR AND PURCHASER.

1. SALES—WHAT LAW GOVERNS—PLACE OF DELIVERY—CONSTRUCTION. Where plaintiffs, doing business at San Francisco, offered, through their broker at Spokane, to sell a car of raisins to the defendants, doing business at Spokane, f. o. b. California, with right to inspect the goods on arrival, terms cash with documents attached, and the offer was accepted through the broker at Spokane, where the accepted contract was afterwards delivered by the broker, the contract is governed by the laws of Washington where delivery of the goods was to be made; especially in view of testimony explaining the expression "terms—cash with documents attached" to mean that the goods were to be shipped with shipping receipt attached to the draft, and not to be delivered and released by the railroad company until paid for. *Phoenix Packing Co. v. Humphrey-Ball Co.*..... **396**

SALES—CONTINUED.

2. SALES—DELIVERY—"F. O. B." An accepted order for shingles "f. o. b. cars" means that the seller shall do all that is necessary to load the cars, including the securing of the cars, especially in view of the universal usage in this state. *Menz Lumber Co. v. McNeeley & Co.* 223

3. SAME—"F. O. B." The terms "f. o. b. California" simply means that the purchaser was to pay the freight from California to the place of destination. *Phoenix Packing Co. v. Humphrey-Ball Co.*. 396

4. SALES—CONTRACT—ACCEPTANCE—EVIDENCE—SUFFICIENCY. An offer to sell and deliver one article f. o. b. at S. and another article f. o. b. at T., will be considered as unqualifiedly accepted by an acceptance of both articles to be delivered f. o. b. at T., where there was evidence of an oral acceptance of the proposal, both parties acted upon the contract as consummated, and the purchaser received and paid for part and claimed damages as to the balance. *Caldwell Bros. & Co. v. Coast Coal Co.*..... 461

5. SALES—PERFORMANCE—PARTIAL PAYMENTS—EFFECT—SETTLEMENT. Upon a sale of two articles for a lump sum, and the refusal of the vendee to accept one of them because of alleged insufficiency, the vendor's acceptance of a sum of money in payment for one of the articles, as a full settlement of that portion of the contract, does not preclude him from recovering the balance of the contract price, nor limit the recovery to the reasonable value of the other article, if the contract was fully performed. *Caldwell Bros. & Co. v. Coast Coal Co.* 461

6. SALES—CONTRACT—WARRANTY. A contract to manufacture and sell "one 400-ton Howe coal washer," according to plans and specifications, which designated it as a Howe coal washer, "Capacity 400-tons per day," and which plans were prepared and agreed upon in detail, is not a guarantee that it is capable of washing 400 tons of coal a day, and is not breached by want of such capacity where it was made according to the specifications. *Caldwell Bros. & Co. v. Coast Coal Co.* 461

7. SAME—DAMAGES FOR BREACH OF WARRANTY—WAIVER. The purchaser of a pump of a certain capacity and of "guaranteed weight 35,000 lbs." cannot recover damages because the pump delivered weighed only 27,000 lbs., if the lighter pump actually performed every function of a pump of the heavier weight and was equally serviceable, durable, and valuable, as the guarantee is waived by receiving the lighter pump. *Eichbaum v. Caldwell Brothers Co.*... 163

8. SALES—ACTION FOR PRICE—PERFORMANCE BY VENDOR—NECESSITY—STATUTES—CONSTRUCTION. Civil Code of California, § 1440, providing that, if a party to a contract gives notice that he will not perform the same, the other party is entitled to enforce the same without previously performing any of the conditions on his part, has no application where the vendee gave notice of cancellation of a sale,

SALES—CONTINUED.

and the vendor refused to accept the cancellation and gave notice that the goods would be shipped as per contract, after which no further communications passed between the parties. *Phoenix Packing Co. v. Humphrey-Ball Co.* 396

9. SALES—ACTION FOR PRICE—WARRANTY—BREACH—EVIDENCE—COMPETENCY. In an action for the price of a pump of a certain capacity and guaranteed weight, evidence that the parties did not know the weight of a pump of that capacity is admissible as bearing upon the question whether the weight was necessary to insure the capacity, a lighter weight having been accepted and damages claimed by the defendant. *Eichbaum v. Caldwell Brothers Co.* 163

10 SAME—DELAY IN DELIVERY—LOSSES NOT CONTEMPLATED. In an action for the price of a pump to be manufactured and shipped within a specified time, the defendant cannot recover loss of rentals during delay in delivery, where there was nothing to show that such damage was within the contemplation of the parties or actually sustained, or that there was any opportunity to rent it if it had been promptly delivered, and it was received before the defendant was ready to use it. *Eichbaum v. Caldwell Brothers Co...* 163

11. SALES—BREACH—DAMAGES—MEASURE. Upon vendee's breach of a contract to purchase logs from the defendant at $6 per thousand, where it appears that defendant's cost in cutting and delivering the logs was $5 and that he subsequently made a contract with a third party therefor at such sum, his profits would have been $1 per thousand, and that is the measure of his damages. *Peterson v. Lone Lake Lumber Co.* 72

12. SALES—ACTION FOR BREACH—DEFENSES—FAILURE TO DELIVER—EXCUSES. In an action to recover for breach of a contract to deliver shingles, no specific date for delivery having been agreed upon, the defense that washouts, mountain snows and slides prevented a delivery within a reasonable time is unavailable, where the plaintiff was not complaining of a failure to deliver while such conditions existed. *Menz Lumber Co. v. McNeeley & Co.* 223

13. SAME—DAMAGES—ASSESSMENT. Upon breach of a contract to deliver carload lots, the size of the car not being specified, damages are assessable on the basis of an average sized car. *Menz Lumber Co. v. McNeeley & Co.* 223

14. SAME—BREACH—MEASURE OF DAMAGES. The measure of the buyer's damages for breach of a contract for the sale of shingles, no definite time for delivery being fixed, is the difference between the contract price and the value of the shingles at the date of the demand and refusal to perform the contract. *Menz Lumber Co. v. McNeeley & Co.* 223

15. SALES—CONDITIONAL SALES—FILING—NECESSITY. Rem. & Bal. Code, § 3670, providing that all conditional sales of personalty placed in the possession of the vendee shall be absolute as to the pur-

SALES—CONTINUED.

chasers, incumbrancers and subsequent creditors in good faith, unless a memorandum of the sale is filed in the auditor's office within ten days after taking possession, is designed to protect subsequent creditors, and renders a sale absolute if the filing is not made as required, although the memorandum was filed before creditors asserted their claims. *American Multigraph Sales Co. v. Jones*..... 619

SAVINGS CLAUSE:

Effect on repeal of statutes, see CRIMINAL LAW, 1, 2.

SCAFFOLDS:

Master's liability for injuries received from defective scaffold, see MASTER AND SERVANT, 7.

SCHOOLS AND SCHOOL DISTRICTS:

1. SCHOOLS AND SCHOOL DISTRICTS—CONTRACTS—LIMIT OF INDEBTEDNESS—EMPLOYMENT OF TEACHER. Under Laws 1893, p. 266, § 3, the contract of a school district with a school teacher to teach school for a period of eight months is void, when the limit of indebtedness contracted in any one year payable out of the general fund had been reached and exceeded in the aggregate the amount apportioned for the district, as provided in said section. *Wolfe v. School District No. 2* 212

2. SAME—LIMIT OF INDEBTEDNESS—NECESSARY EXPENSES. The maintaining of a school for a period of eight months is not such a necessity as to render valid a teacher's contract therefor when the indebtedness incurred exceeded the limit authorized by law. *Wolfe v. School District No. 2*..... 212

SELECTION:

Of jury, see JURY, 2, 3.

SEPARATE ESTATE:

Of husband or wife, see HUSBAND AND WIFE, 2, 3.

SEPARATION:

Of jury, see CRIMINAL LAW, 6, 7.

SERVICE:

Of process, see PROCESS.

SET-OFF AND COUNTERCLAIM:

1. SET-OFF AND COUNTERCLAIM—CONNECTION WITH SUBJECT-MATTER OF ACTION—INJUNCTION—DAMAGES. In an action to enjoin the defendant from filling up a drainage ditch constructed by the plaintiffs, an independent claim by defendant for damages to his land by reason of the construction of the ditch is not a proper counterclaim, within Rem. & Bal. Code, § 265, authorizing a counterclaim for a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action. *Morrison v. Bernot* 302

SETTLEMENT:

Between partners, see ACCOUNT STATED.
As affecting cause of action, see ACTION.

SHIPPING:

Tax for inspection of grain, see INSPECTION.

SHORE LANDS:

Purchase from state, see PUBLIC LANDS.

SHOWING:

For change of venue, see VENUE.

SIGNATURES:

To informations, see INDICTMENT AND INFORMATION.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—RIGHTS OF THIRD PERSONS. Specific performance of an executory contract of sale will not be decreed, as against a subsequent *bona fide* purchaser who had notice of the contract before he had fully paid for the land, where he had assumed payment of a debt, incurred liability on a note, and entered into possession and made valuable improvements in good faith; as the enforcement of the contract would be oppressive to an innocent third party. *Bernard v. Benson* 191

2. SPECIFIC PERFORMANCE—PARTIES ENTITLED—PARTNERS. Plaintiff suing for specific performance of a contract made by a corporation to sell land to himself and one L. cannot enlarge his interest to the exclusion of L. by reason of the fact that L. was interested in and controlled the corporation making the sale, and aided the corporation in its defense and would be benefited by defeating the action. *Whipple v. Lee* 253

3. SPECIFIC PERFORMANCE—CONTRACTS—UNCERTAINTY—PRINCIPAL AND AGENT. A contract whereby defendant agreed to sell certain corporate stock to the plaintiff, or to whomsoever he may direct, for the sum of not less than $30,000 and as much more as it may be sold for to any other person than the plaintiff is one of agency, in which the price is left uncertain where no sale was made to a third person, and therefore cannot be specifically enforced. *Huston v. Harrington* 51

4. SAME—CONTRACTS—CONFIDENTIAL RELATION. A contract by defendant to sell to plaintiff certain corporate stock will not be specifically enforced where the plaintiff was acting as defendant's confidential agent in sole charge of the business, and failed to fully inform the defendant of the condition of the property and of an increase in its rental value, and part of the tender to defendant was from money belonging to the corporation paid in advance upon such increased rentals. *Huston v. Harrington* 51

SPECULATIVE DAMAGES:

See DAMAGES, 2.

SPLITTING CAUSES:

See ACTION.

SPRINGS:

Riparian rights of lower proprietor to waters of new springs, see WATERS AND WATER COURSES, 2.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 14, 18; CRIMINAL LAW, 4, 8.

STATES:

Sale of public lands, see PUBLIC LANDS.

STATUTES:

See GAMING, 1.

Appropriations by county for fair association, see AGRICULTURE.

Construction of statute authorizing assessment to pay cost of Lake Washington Canal, see CANALS.

Construction of law prohibiting discrimination between shippers, see CARRIERS, 16.

As violative of constitutional rights, see CONSTITUTIONAL LAW.

Inspection of corporate books and papers, see CORPORATIONS, 5, 6.

Repeal, punishment under existing laws, savings clause, see CRIMINAL LAW, 1, 2.

Proceedings to take property for public use, see EMINENT DOMAIN, 9.

Presumptions as to statutes of another state or country, see EVIDENCE, 2.

Discharge on habeas corpus on ground of unconstitutional statute, see HABEAS CORPUS.

Prohibiting sale of liquor to Indians, see INDIANS.

Construction of act regulating shipping and inspection of grain, see INSPECTION.

Repeal of laws for control or regulation of liquor traffic, see INTOXICATING LIQUORS.

Summoning and attendance of jurors, see JURY, 2, 3.

Statutes of limitation, see LIMITATION OF ACTIONS.

Construction of statute relating to liability for injury to servant engaged in interstate commerce, see MASTER AND SERVANT, 5.

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 5, 8-11.

Public improvements, see MUNICIPAL CORPORATIONS, 8, 11.

Amendment of municipal charter creating municipal plans commission, see MUNICIPAL CORPORATIONS, 1-3.

Preference right to purchase shore lands, see PUBLIC LANDS.

Action for price, construction, see SALES, 8.

Inheritance tax and rights of aliens, see TREATIES.

STIPULATIONS:

Limiting rights sought and reducing damages, see EMINENT DOMAIN, 2, 3.

STOCK:

Corporate stock, see CORPORATIONS, 1-3.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-3.

STREET RAILROADS:

Action by passenger for wrongful ejection, see CARRIERS, 5-10.

Imputed negligence of driver of vehicle in collision with street car, see NEGLIGENCE, 5.

1. STREET RAILWAYS—COLLISION WITH VEHICLE—NEGLIGENCE—QUESTION FOR JURY. The negligence of a motorman on a street car in failing to avoid a collision with an ice wagon is for the jury, where it appears that the horses became frightened and could not be kept from crowding onto the car track while the street car was a block away, that the motorman could have observed the team, brought his car under control, and avoided the injury, and the driver of the team, an experienced man, did all he could to avoid it. *Cathey v. Seattle Electric Co*..... 176

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 1-3.

SUMMONS:

See PROCESS.

Foreclosure of tax lien, see TAXATION, 2.

SUSPENSION:

Of statute on reversal of judgment, see LIMITATION OF ACTIONS.

TAX:

For inspection of grain shipped, see INSPECTION.

TAXATION:

Validity of license tax on sale of goods by automatic device, see CONSTITUTIONAL LAW, 3.

Liquor licenses, see INTOXICATING LIQUORS, 4.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 5, 9-11.

Levy for municipal plans commission fund, see MUNICIPAL CORPORATIONS, 2.

Service of process in action to vacate default judgment, see PROCESS.

Inheritance tax and rights of aliens, see TREATIES.

1. TAXATION—RIGHTS OF MORTGAGEE—REMEDIES—LIMITATIONS—EQUITABLE LIEN. Rem. & Bal. Code, § 9234, prescribing a remedy for the collection of taxes paid by a mortgagee for the purpose of protecting

TAXATION—CONTINUED.

his lien was not intended as an exclusive remedy; and his equitable right of subrogation does not expire with the lien of his mortgage, the statute providing that the lien for taxes shall continue until the taxes are paid. *Childs v. Smith* 148

2. TAXATION—PROCESS—SUMMONS—SUFFICIENCY. A tax foreclosure judgment is void where it was entered upon the service of a summons by publication which required the defendants to appear within sixty days after the service of the summons, instead of sixty days after the first publication. *Thompson v. Schoner* 642

3. TAXATION—TAX DEED—ACTION TO SET ASIDE—EVIDENCE OF TITLE. A nonresident plaintiff in an action to set aside a tax deed is sufficiently identified as the grantee in a recorded deed from the conceded holder of the title, where he testified that he purchased the lot from such holder, paid for it, and produced tax receipts showing payment by him of taxes thereon, and that he lived in the state given as the residence of the grantee in the deed. *Pillsbury v. Beresford* 656

4. SAME—CONDITION PRECEDENT—TENDER OF TAX. A tender of taxes as a condition precedent to an action to set aside a tax deed is excused where it appears that the defendants claimed title to the land and plainly indicated that any tender would be refused. *Pillsbury v. Beresford* 656

5. TAXATION—TAX DEED—CANCELLATION—EXCUSE FOR FAILURE TO PAY TAXES. The negligence of the county treasurer prevented the payment of taxes and a county tax deed is void, where the owner attempted in good faith to pay taxes upon platted property, and on furnishing a list was informed by the county treasurer that all delinquent taxes were paid; and it is immaterial whether the lists furnished described the property by government subdivision as assessed at one time, or as it has been platted and assessed later. *Blinn v. Grindle* 679

6. SAME—ACTIONS TO CANCEL DEED—LIMITATIONS—LACHES. An action to cancel a tax deed commenced within the time limited by Rem. & Bal. Code, § 162, is not barred by laches where there was nothing in the record upon which to predicate laches. *Blinn v. Grindle* 679

TAXATION OF COSTS:

See COSTS.

TEACHERS:

Contract to teach school as incurring debt exceeding legal limit, see SCHOOLS AND SCHOOL DISTRICTS.

TEAM:

Exemption from forced sale, see EXEMPTIONS, 1.

TELEGRAPHS AND TELEPHONES:

1. TELEGRAPHS AND TELEPHONES—WRONGFUL OPENING OF TELEGRAM—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that defendant opened a telegram making plaintiff a cash offer for land, where it appears that it was delivered to defendant upon his offering to deliver it to the plaintiff, that he did not deliver it, but on the next day defendant closed a trade with the plaintiff for the land, which trade he had just previously refused to make, and after the trade attempted to dispose of the land to the party who had made the offer in the telegram. *Deighton v. Hover* 12

2. SAME—MEASURE OF DAMAGES. Under Rem. & Bal. Code, § 2977, giving treble damages for all loss and damages sustained by the wrongful opening of a telegram, where defendant, by wrongfully opening a telegram making plaintiff a cash offer for land, induced plaintiff to trade the land to the defendant for less than was offered, the measure of damages is the difference between the value of the land given and the value of that received, irrespective of the tentative offer, where it was probable plaintiff could have sold for its full value. *Deighton v. Hover* 12

TENDER:

Of fare to avoid ejection from train, see CARRIERS, 10.
Excusing tender of tax in action to vacate deed, see TAXATION, 4.
Of performance by vendor of land, see VENDOR AND PURCHASER, 3.

TIDE LANDS:

Disposal of state tide lands, see PUBLIC LANDS.

TIME:

For bringing suit for performance or breach of contract, see CONTRACTS, 3.
For payment of premiums, see INSURANCE, 12.
For filing statement or claim for mechanic's lien, see MECHANICS' LIENS.
Evidence of extension of for removal of timber, see VENDOR AND PURCHASER, 1, 2.

TITLE:

To maintain suit to quiet title, see QUIETING TITLE.
Plaintiff's evidence of in action to vacate tax deed, see TAXATION, 3.
Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 3, 4, 10.

TORTS:

See ASSAULT AND BATTERY; NEGLIGENCE.
In carriage of passengers, see CARRIERS, 5-10.
By corporations, see CORPORATIONS, 5, 6.
Items of damages recoverable in action for assault, see DAMAGES, 1, 2.

TORTS—CONTINUED.

Damages, inadequate or excessive, see DAMAGES, 4.
Damages for causing death, see DEATH.
Injuries from explosives, see EXPLOSIVE.
Liability of community property for tort of spouses, see HUSBAND AND WIFE, 4.
Proper or necessary parties in actions for, see PARTIES.
Negligent operation of railroads, see RAILROADS, 1.
Setting off damages for torts, see SET-OFF AND COUNTERCLAIM.
Injuries caused by operation of street cars, see STREET RAILROADS.
Wrongful opening of telegram, see TELEGRAPHS AND TELEPHONES.
Diversion of natural water courses, see WATERS AND WATER COURSES, 4-8.

TOWNSHIPS:

Regulation and control of liquor traffic, see INTOXICATING LIQUORS, 1, 2.

TRANSFERS:

Rights of passenger upon refusal to obey rules of company, see CARRIERS, 5.

TREATIES:

1. TREATIES—STATE LAWS—CONFLICT OF LAWS. State laws in conflict with treaties between the United States and foreign countries are held in abeyance during the existence of the treaty. *In re Stixrud's Estate* 339

2. TREATIES—ALIENS—DISABILITIES. The removal of disabilities of aliens as to the acquisition of property in the several states is a proper subject of treaty between the United States and foreign countries. *In re Stixrud's Estate* 339

3. TREATIES—CONSTRUCTION—"RESPECTIVE." A treaty providing that the subjects of the contracting parties "in the respective states" may freely dispose of their property, means that the subject may freely dispose of his property within the country of his citizenship; "respective" meaning "pertaining or relating severally to each of those under consideration." *In re Stixrud's Estate* 339

4. SAME—ALIENS—DESCENT AND DISTRIBUTION—SUCCESSION UNDER TREATY—CONSTRUCTION. The treaty between Norway and Sweden and the United States, providing that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament or otherwise and that their heirs in whatever place they shall reside shall recive the succession, etc., entitles aliens residing in Sweden to take property devised to them by a naturalized citizen of the United States; especially in view of the rule of liberal construction applicable to treaty rights. *In re Stixrud's Estate* 339

TREATIES—CONTINUED.

5. SAME—INHERITANCE TAX—RIGHTS OF ALIENS—STATUTES—VALIDITY. Rem. & Bal. Code, § 9183, providing for an inheritance tax of twenty-five per cent on all sums passing to collateral relatives who are aliens not residing in the United States, which exceeds the tax upon relatives who are citizens of the United States, violates the treaty between Norway and Sweden and the United States, which provides that the subjects of the contracting parties may freely dispose of their goods and effects by testament and that their heirs in whatever place they shall reside shall receive the succession, exempt from all duty called "droit de detraction" on the part of the government of the two states respectively; since an inheritance tax is an impost or excise on the right to pass the estate and not a tax upon the property, and the treaty was intended to secure to aliens the right to succeed to property upon the same terms provided by general laws for our own citizens. *In re Stixrud's Estate*..... 339

6. TREATIES—CONSTRUCTION—"GOODS AND EFFECTS." A treaty securing to aliens the right to succeed to "goods and effects" embraces real property. *In re Stixrud's Estate*..... 339

7. TREATIES—CONSTRUCTION—HEIRS. The treaty between Norway and Sweden and the United States, securing to alien "heirs" the right to "receive the succession" to property, covers the right of succession by testament as well as by operation of law. *In re Stixrud's Estate* 339

TRESPASS:

To the person, see ASSAULT AND BATTERY.

TRESPASSERS:

Injury to child from explosion of dynamite, see EXPLOSIVES.

TRIAL:

Waiver of objections to right of appeal, see APPEAL AND ERROR, 9.

Review as dependent on motion for new trial, see APPEAL AND ERROR 13.

Review of failure to give instruction as dependent on request for same in lower court, see APPEAL AND ERROR, 10, 11.

Review of rulings as dependent on presentation of evidence, see APPEAL AND ERROR, 13.

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 12, 13.

Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 12-18.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 26-30.

Review of findings in trial by court, see APPEAL AND ERROR, 21.

Instructions in civil action for assault, see ASSAULT AND BATTERY.

Right to transfer cause to different department for trial, see COURTS.

In criminal prosecutions, see CRIMINAL LAW, 3-7.

TRIAL—CONTINUED.

Condemnation proceedings, see EMINENT DOMAIN.
Instructions in condemnation proceedings, see EMINENT DOMAIN, 3, 5, 6, 12.
Instructions for conducting game of poker, see GAMING, 3.
Instructions in prosecution for murder, see HOMICIDE, 3.
Summoning and impaneling jury, see JURY, 2, 3.
Right to trial by jury, see JURY, 3.
Instructions as to contributory negligence, see MASTER AND SERVANT, 10.
Motions and grounds for new trial, see NEW TRIAL.
Findings of referee, see REFERENCE.

1. TRIAL—PROVINCE OF COURT AND JURY—PRIMA FACIE CASE—JUDGMENT NOTWITHSTANDING VERDICT. Where, on a former appeal, a nonsuit is reversed because the evidence made out a *prima facie* case for the jury, it is error on a retrial, after refusing a nonsuit because the evidence was substantially the same as on the former trial, for the trial court to grant a judgment for the defendant notwithstanding a verdict for the plaintiffs; his power being limited to the granting of a new trial if the verdict amounted to a miscarriage of justice. *O'Connor v. Force* 215

2. TRIAL—INSTRUCTIONS. It is not error to refuse instructions covered by the general charge. *Wharton v. Tacoma Fir Door Co.*. 124
Weed v. Foster 675
State v. George 681

3. TRIAL—VERDICT—SPECIAL DAMAGES—INCONSISTENCY—CONTRACTS—CONSIDERATION. In an action by a subcontractor to recover additional compensation promised him after undertaking the work, a special finding by the jury that the consideration for the promise was the fact that the principal contractors were under bond to complete the work within a stated time does not control a general verdict for the plaintiff, where the jury were instructed that they must find some consideration for the promise and that one promise is a good consideration for another; since (1) the consideration for the promise was a legal question for the court, (2) the special finding implies that the minds of the parties met and that mutual promises were made, and (3) the consideration found was sufficient. *Evans v. Oregon & Washington R. Co.* 429

4. TRIAL—VERDICTS—JUDGMENT—CONFORMITY TO VERDICT—HOSPITAL ASSOCIATIONS—MALPRACTICE. In an action for malpractice against a physician, and a hospital association and its successor by whom he was employed at different periods of plaintiff's treatment, a verdict against the hospital association separately for $2,000, against its successor for $4,000, and against the physician individually for $1,000, does not authorize a joint and several judgment against all the defendants for $7,000, nor against the physician for said sum, nor a joint judgment against any two of them, when read in the light of the court's instructions to the jury that they might bring in

TRIAL—CONTINUED.

separate verdicts against the hospital association and its successors for negligence other than that of the physician, and against the physician individually for negligence while not acting as agent; nor a joint verdict against the hospital association and the physician for his negligence during one perod of the treatment while the physician was in its employ, a joint verdict against the successor and the physician for another period while in its employ, and a verdict against the physician individually while not in the employ of either. *O'Brien v. American Casualty Co.* 477

5. TRIAL—VERDICTS—CONFLICTING FINDINGS—HOSPITAL ASSOCIATIONS —MALPRACTICE—JOINT AND SEVERAL LIABILITY. In an action for malpractice against a physician and a hospital association and its successor by whom he was employed at different periods of the plaintiff's treatment, in which the gravamen was the negligence and incompetence of the physician, the verdict is unsupported by the evidence and conflicting and there was a substantial mistrial, requiring a new trial, where the court instructed the jury that they might bring in separate verdicts against the hospital association and its successors for negligence other than that of the physican, and against the physician individually for negligence while not acting as agent, or a joint verdict against the hospital association and the physician for his negligence during one period of the treatment while the physician was in its employ, a joint verdict against the successor and the physician for another period while in its employ, and a verdict against the physician individually while not in the employ of either, and under the instructions the jury returned a general verdict against one association separately for $2,000, against the other association separately for $4,000, and against the physician individually for $1,000, and also answered special interrogatories to the effect that the $2,000 damages assessed against the hospital association was due to the negligence of the physician acting as its servant, during the only period of the treatment that the physician could have been acting individually; and a judgment for $1,000 against all the defendants notwithstanding the verdict is error, since any permanent injury resulted from the negligence of the physician and the findings fail to fix the responsibility therefor upon either the association or its successor. *O'Brien v. American Casualty Co.*..... 477

TRIAL BY JURY:

See JURY, 3.

VACATION:

Review of order vacating default judgment, see APPEAL AND ERROR, 2, 3.

Of attachment, see ATTACHMENT.

Of tax deed, see TAXATION, 3-6.

VALUE:

Of land or buildings appropriated for public use as measure of compensation, see EMINENT DOMAIN, 4, 6, 7, 14.

Opinion evidence as to value of property, see EVIDENCE, 12, 14.

Waiver of right to question value of property in debtor's claim of exemption, see EXEMPTIONS, 3.

VEHICLES:

Contributory negligence of driver of vehicle imputable to occupant, see NEGLIGENCE, 5.

VENDOR AND PURCHASER:

Possession and mistake as to boundaries as constituting adverse possession, see ADVERSE POSSESSION.

Cancellation of grantor's deed, see CANCELLATION OF INSTRUMENTS.

Parol evidence to explain written contract for sale of land, see EVIDENCE, 5.

Conveyances between husband and wife, see HUSBAND AND WIFE, 1, 2.

Conclusiveness as against vendee of judgment against vendor, see JUDGMENT, 5.

Sale of state lands, see PUBLIC LANDS.

Transfers of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE, 1, 2.

1. VENDOR AND PURCHASER—CONTRACTS—RESERVATION OF TIMBER—TIME FOR REMOVAL—EXTENSION—EVIDENCE—SUFFICIENCY. There is not sufficient evidence of an oral extension of the time reserved within which to remove timber from land sold by the plaintiff to defendant, where plaintiff could not testify that the defendant made any further reply than to say "yes" or nod his head when asked for the extension, leaving an impression that it would be satisfactory, and defendant denied granting any extension. *Lehtonen v. Marysville Water and Power Co.* 86

2. SAME—EVIDENCE OF EXTENSION—ADMISSIBILITY. Upon an issue as to whether an extension of time had been granted for the removal of timber, evidence as to what the party would have done to protect his interest if the extension had been refused is properly excluded as immaterial. *Lehtonen v. Marysville Water and Power Co.* ... 86

3. VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE BY VENDOR—ACTION FOR PRICE—DEFENSES—TITLE. In an action to recover on a promissory note given as the first cash payment on a sale of land which the vendee sought to rescind, it is immaterial that the title of the land stood in the name of a third party, where at the time of the sale the vendor secured a deed of the lands from the title holder to the vendee, and placed the same in escrow at the vendee's request awaiting deferred payments, and the vendor was able to perform and tendered full performance. *Ankerson v. Larson* 113

VENDOR AND PURCHASER—CONTINUED.

4. SAME—OBJECTIONS TO TITLE—WAIVER—EVIDENCE—ADMISSIBILITY. The oral and written opinion of an attorney pointing out defects in the title as shown by an abstract of title, is not admissible in evidence upon an issue as to the vendee's right to rescind, where the opinions were acts in the preliminary proceedings long before the execution of the contract, the defects were not pointed out by the vendee to the vendor or corrections requested, and no objections were made to the title, which was satisfactory to the vendee when the contract was made. *Ankerson v. Larson* 113

5. VENDOR AND PURCHASER—CONTRACT — ASSIGNMENT—CONSENT OF VENDOR. A contract for the purchase of land is assignable by the vendee without the consent of the vendor, where there were no special circumstances in the contract to indicate an intention of the parties that it was not assignable, but on the contrary it contained a clause to the effect that, wherever the words vendor or vendee appear, it is understood to include heirs, assigns, successors, etc.; and it is immaterial that on the back of the contract, after a form for an assignment, there was a recital for acceptance and approval of the assignment; since it was no part of the contract, and simply a provision for a novation. *Hunter Tract Improvement Co. v. Stone* 661

6. VENDOR AND PURCHASER—RECORD OF CONTRACT—NOTICE—STATUTES. Construing together the recording acts, executory contracts for the sale of real estate, while not expressly mentioned, are included within the meaning of the words "deeds, grants and transfers of real property," and may be recorded, especially in view of the custom to record the same. *Bernard v. Benson* 191

7. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RIGHTS—NOTICE. A *bona fide* purchaser from a *bona fide* purchaser is not affected by subsequent notice given to his vendor. *Bernard v. Benson* 191

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORD—NOTICE. Under Rem. & Bal. Code, § 8785, requiring the county auditor to procure such "books for records as the business of the office requires," and in view of the uniform custom to record instruments affecting the title to real property in Deed Records, and of personal property in Miscellaneous Records, the record of an executory contract for the sale of real estate in Miscellaneous Records does not import notice. *Bernard v. Benson* 191

9. SAME—ACTUAL NOTICE—POSSESSION OF PROPERTY. Actual notice of an executory contract for the sale of real estate, recorded in the wrong book, is not to be imported from the fact that one of the vendees had slashed about two acres of the tract, where he had subsequently abandoned the same; nor by the fact that the cattle of such vendee and of others ranged upon the property; nor by the fact that one of the vendees lived in a small house either on the

VENDOR AND PURCHASER—CONTINUED.

property or in a county road, where such vendee did not assert any claim or right to possession in conversations with the *bona fide* purchasers. *Bernard v. Benson* 191

10. VENDOR AND PURCHASER—DEFECTS IN TITLE—RIGHTS OF VENDEE. The purchaser of a tract of land, who finds that part of the land is owned by a third party, from whom he purchased such part, is entitled to a credit for the sum paid for such part. *Bernard v. Benson* 191

VENUE:

1. VENUE—LOCAL PREJUDICE—SHOWING. Upon a strong *prima facie* showing of local prejudice for a change of venue, the state should make a counter showing. *State v. George* 681

VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 22-25.
Excessive verdict in action by brokers for breach of contract, see BROKERS, 5.
Inadequate or excessive verdict, see DAMAGES, 4.
Excessive damages for wrongful death, see DEATH.
In prosecution for playing or conducting game, see GAMING, 2, 3.
In civil actions, see TRIAL, 3-6.

VERIFICATOION:

Of informations, see INDICTMENT AND INFORMATION.

VICE PRINCIPALS:

Acts of foreman, see MASTER AND SERVANT, 4.

WAGONS:

Exemption from forced sale, see EXEMPTIONS, 1.

WAIVER:

See ESTOPPEL.
Objection to splitting cause of action, see ACTION.
Of right to appeal, see APPEAL AND ERROR, 9.
Of exceptions or objections, see APPEAL AND ERROR, 10-13.
Of stipulation in contract for sale of bonds, see BROKERS, 1.
Of right of accused to demand copy of charge, see CONSTITUTIONAL LAW, 1.
Exemption from execution, see EXEMPTIONS, 3.
Of right to complete building after abandonment, see PRINCIPAL AND SURETY, 4.
Breach of warranty in sale, see SALES, 7.
Objections to title, see VENDOR AND PURCHASER, 4.

WAREHOUSEMAN:

Tax for inspection of grain shipped, see INSPECTION.

WARRANTY:

In application for insurance, see INSURANCE, 4-10.
On sale of goods, see SALES, 6, 7, 9.

WATERS AND WATER COURSES:

See CANALS.
Exercise of power of eminent domain, see EMINENT DOMAIN, 2, 4, 12, 13.
Waters capable of navigation as public highways, see NAVIGABLE WATERS.
Liability of water company for injuries to traveler by reason of excavation across public highway, see NEGLIGENCE, 2.

1. WATERS AND WATER COURSES—APPROPRIATION—RIPARIAN RIGHTS. The right to waters by a prior appropriation thereof obtains only in the case of waters upon public lands, and not to waters upon land where the title from the government had been obtained or initiated; since the common law doctrine of riparian rights prevails in this state and would attach to lands acquired from the government, preventing appropriation thereof. *Mason v. Yearwood* 276

2. SAME—RIPARIAN RIGHTS—NEW SPRINGS. No riparian rights can be claimed by a lower proprietor in or to the waters of a new spring that breaks out upon the lands of another and flows therefrom across his land, riparian rights attaching only to streams that are wont to flow from time immemorial. *Mason v. Yearwood* 276

3. WATERS AND WATER COURSES—RIPARIAN RIGHTS. An upper riparian owner may not impound all the waters of a natural water course for fourteen hours out of every twenty-four without the consent of lower proprietors or the condemnation of their rights. *Tacoma Eastern R. Co. v. Smithgall* 445

4. WATERS AND WATER COURSES—DIVERSION—DAMAGES—EVIDENCE—SUFFICIENCY. In an action against a city for the wrongful diversion of the waters of a creek, the fact that riparian owners were also diverting the waters is no defense, where they were using only the amount to which they were entitled and no material damage would have resulted to plaintiff but for the substantial diversion made by the city. *Dement Brothers Co. v. Walla Walla* 60

5. SAME—MEASURE OF DAMAGE. The measure of damages for diverting water from a mill power, where electrical machinery was installed to operate the mill, is the cost of operating the same. *Dement Brothers Co. v. Walla Walla* 60

6. SAME—DIVERSION—DAMAGES—EVIDENCE—SUFFICIENCY. An owner of a mill may recover damages for the diversion of the waters of a stream used for power purposes, although the mill formerly shut down during the dry season because of insufficient water to run the mill, where it appears that while there was a general shortage

WATERS AND WATER COURSES—CONTINUED.

through the winter months, even during the dry season there had been power enough to elevate and clean grain and run a feed mill. *Dement Brothers Co. v. Walla Walla* 60

7. SAME—DIVENSION — STREAMS — CHANNELS. Where springs, the principal source of a city supply, are fed by waters diverted by the city from a stream, so that the diverted waters can be traced as a part of the surface flow, a lower proprietor on the stream may recover his damages caused by the diversion. *Dement Brothers Co. v. Walla Walla* 60

8. SAME—WATER RIGHTS—PRESCRIPTION—ADVERSE USE — EXTENT—EASEMENTS. Where new springs broke out upon the defendant's land, and the flow constantly increased from year to year, an adjoining owner, who for twenty-five years diverted and continuously used water from the springs, acquired a prescriptive right to the use of so much of the water as she had adversely used during the statutory period of ten years immediately preceding defendant's obstruction thereof; since easements may be acquired by adverse use; but the plaintiff could not enjoin the defendant's use and diversion of the increased flow not diverted and adversely used by the plaintiff ten years previously. *Mason v. Yearwood* 276

9. WATERS AND WATER COURSES—POLLUTION OF STREAM—RIPARIAN RIGHTS—EQUITY—INJUNCTION. Equity will restrain a logging company from polluting a stream constituting a city water supply, by the use of a bridge which had settled into the water, where the bridge could be raised and the injury obviated at slight expense, even though the logging operations were carried on in the usual manner; since (1) each riparian owner's rights is qualified by the reasonable rights of the other, and (2) the pollution was due to improper use of the land and not of the waters of the stream. *Aberdeen v. Lytle Logging & Mercantile Co.* 368

WAYS:

Injury to traveler invited to use private way, see NEGLIGENCE, 1-4.

WILLS:

Disposal of property and right of succession by alien heirs, see TREATIES.

1. WILLS—PROBATE—CONTEST—COSTS—ALLOWANCE—EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE. The costs and expenses incurred for attorney's fees in contesting the probate of a will are not a claim against the estate of the deceased which must be presented to the administrator for allowance, and they are properly allowed, when the will is held void, as a judgment against the estate, under Rem. & Bal. Code, § 1313, after a citation to the administrator and a hearing before the court. *In re Statler's Estate*. 199

WILLS—CONTINUED.

2. SAME—PROCEEDINGS—COSTS—SECURITY FOR. A proceeding against an administrator by citation, to secure allowance of costs for contesting the probate of a will, is but a continuation of the probate contest, and a bond for security for costs by nonresident contestants cannot be required. *In re Statler's Estate* 199

3. SAME—COSTS—PARTIES ENTITLED—"BENEFIT" TO ESTATE. Costs and attorney's fees for contesting the probate of a will may be allowed as a "benefit" to the estate, where the contestants were successful and the expenses when allowed reduce their residuary share in the estate. *In re Statler's Estate*..... 199

4. SAME—AMOUNT OF COSTS. Costs and attorney's fees for contesting the probate of a will are not confined to the costs allowed by the general statutes, Rem. & Bal. Code, § 481; but are governed by the special statute, Id., § 1313, in which no limitation is fixed. *In re Statler's Estate* 199

WITNESSES:

Fees as costs, see COSTS, 2.
Opinions, see EVIDENCE, 8-14.
Competency of expert witnesses in civil actions, see EVIDENCE, 14.
Dying declarations, see HOMICIDE, 2.

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. In an action against an estate by a former partner of the deceased, plaintiff is disqualified from testifying as to any transactions had with the deceased. *Shaw v. Lobe* 219

2. WITNESSES—CROSS-EXAMINATION—DISCRETION. Where the defendant had testified as to the rate of speed he had been in the habit of running his automobile, it is discretionary for the trial court to allow cross-examination as to the speed he had run on a specified occasion, for the purpose of testing his accuracy of recollection. *Buckles v. Reynolds* 485

3. WITNESSES—IMPEACHMENT. In an action by an experienced rip sawyer to recover for injuries sustained by reason of a defect in the saw of which he had no notice, after the mill superintendent had testified on cross-examination that he would not put a green hand to work upon a ripsaw without instructions, it is not competent to impeach the witness in this respect, as the matter is collateral to the issue and the party is concluded by the answer of the witness. *Wharton v. Tacoma Fir Door Co.* 124

4. WITNESSES—IMPEACHMENT—COLLATERAL MATTERS. In an action for assault in the ejection of a passenger from a street car, the motorman cannot be impeached in regard to testimony as to his age, drawn out on cross-examination, as it was a collateral matter. *Kirk v. Seattle Electric Co.* 283

WITNESSES—CONTINUED.

5. WITNESSES—IMPEACHMENT—EXPERTS—REPUTATION. It is not error to permit a medical expert to be impeached upon his general reputation for truth and veracity, the same as in the case of any other witness. *State v. Newcomb* 414

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WRITINGS:

Province of court in construing written order and acceptance, see CONTRACTS, 2.

Parol evidence to vary or explain, see EVIDENCE, 5-7.

WRITS:

See CERTIORARI; HABEAS CORPUS; PROCESS.

HARVARD LAW